S. HRG. 99-733

PRODUCT LIABILITY VOLUNTARY CLAIMS AND UNIFORM STANDARDS ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

S. 1999

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES.

FEBRUARY 27, MARCH 11, 1986

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PRODUCT LIABILITY VOLUNTARY CLAIMS AND UNIFORM STANDARDS ACT

THURSDAY, FEBRUARY 27, 1986

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on the Consumer,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 253, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

Staff members assigned to these hearings: David Zorensky, staff counsel; Andrew Koppelman, professional staff member; and Amy Bondurant, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator **Kasten**. The committee will come to order. Today the Senate Consumer Subcommittee begins the first 2 days of hearings on S. 1999 and related product reliability reform proposals. S. 1999 is in a sense a combination of efforts that we have been making with Senator Danforth's leadership to add a new concept of a limited compensation system to S. 100 which is the bill that has been the vehicle that a number of us have been working through from S. 44 to S. 100. Now we are looking at an overall vehicle which includes parts of both.

We are considering this product liability bill at a time when the need for reform has never been greater and has never been more apparent, because of the current crisis with respect to the cost and the availability of liability insurance.

I might say that the need for reform has also never been more apparent with the small business community and I, along with Senator Weicker and others, have been having a series of hearings concurrent with these in the Small Business Committee as well.

Like other members of Congress, every time I go back to my home State of Wisconsin, I hear story after story of skyrocketing insurance rates and of well established manufacturing firms that must go bare or discontinue operations because they can no longer obtain liability coverage.

Because of the urgency of this problem and because of its impact on all Americans, members of Congress are now seeking solutions to the liability insurance crisis. Many of them seem to be recognizing, as I have for a number of years, that reform of the tort system, particularly product liability reform, is essential if we are to resolve this problem.

As a consequence, I am pleased to see that efforts to achieve such reform are going forward with S. 1999. This bill contains, as I said, important elements of my own product liability reform legislation, S. 100. It is a bill that has evolved over the past year in a process that attempts to address the common interests of manufacturers, consumers, and those injured by defective products.

Senator Danforth is to be commended for his leadership in this process and in his efforts to build a broad consensus of support for such legislation.

Those of you that have been part of this process are aware of the fact that we have been working, putting together manufacturing groups with labor groups, with consumer groups, with a number of experts in the legal profession in an overall consensus-building effort.

S. 1999 is based on the view that the existing product liability litigation system is costly; it is based on the view that the existing product liability litigation system is slow; that the existing product liability litigation system is inefficient; and, most importantly, that the existing system is unpredictable. It is a system that does not benefit manufacturers, consumers, or anyone injured by a defective product.

There are those of us who have taken different approaches to product liability reform, but there is agreement, I think, that the existing product liability litigation system does not work and that a Federal solution is warranted.

We have a system that is capricious, wasteful, and really of benefit only to members of the trial bar. Because of this basic agreement and basic consensus that I believe we are in the process of reaching, I am hopeful that after these hearings we will be able to reach an accord on a product liability reform bill that will establish uniformity, remove the uncertainties of the existing system, simplify the process by which victims are compensated for product injuries and, most importantly, reduce the current waste of our resources in litigation.

To be sure, the task before us remains a challenging one. S. 1999 is a complex bill and raises many difficult questions that must be resolved, but I welcome this undertaking and I hope that after these hearings the committee will be able to move ahead quickly with this much needed product liability reform effort.

I would like to welcome all of today's witnesses, but before we go forward I would like to ask if Senator Hollings has a brief opening statement.

OPENING STATEMENT BY SENATOR HOLLINGS

Senator HOLLINGS. Yes, thank you.

Today, the Commerce Committee will focus on a new approach to the issue of Federal product liability codification.

S. 1999, introduced by Chairman Danforth, seeks to combine an alternative compensation system with changes in the rules of tort. Previous legislation, S. 100 in particular, had sought changes solely in substantive tort law. As you all know, the Committee declined to report that bill last year.

As I see it, S. 1999 would not bring victims of defective products either the best of tort or the best of compensation. And I don't believe that it would bring to defendants the reduced litigation costs and the uniformity that they seek.

In addition, I have serious concerns about any legislation that might undermine our current system's ability to provide incentives for product safety. It is this system which has driven from the marketplace such dangerous products as the Dalkon Shield and the Ford Pinto, to name a couple.

I look forward to hearing the views of today's witnesses, and I will continue my keen interest in this important issue.

Senator KASTEN. Senator Danforth.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Mr. Chairman, I do have one which I will read in the record, if that is permissible with you.

Senator KASTEN. Without objection, so ordered.

Today, we begin hearings on S. 1999, the "Product Liability Voluntary Claims and Uniform Standards Act"—a bill that establishes a new alternative claim system for those injured by defective products, and that imposes uniform product liability standards for tradiational litigation that preempt State law. This measure gives a person injured by a defective product a choice. One can file a traditional lawsuit for full damages, including pain and suffering and punitive damages, under uniform liability standards that are based largely on negligence or fault. As an alternative, without filing a lawsuit, one can file a claim directly with the manufacturer for more certain and expedited recovery of acutal, out-of-pocket losses that are not reimbursed from other sources. This bill also provides special claim system mechanisms for resolving disputes as to causation in cases involving toxic harm linked to long-term exposure to toxics—a problem of particular concern in the workplace.

S. 1999 is a complex bill. Perhaps that is why recent nespaper accounts here and elsewhere have incorrectly or incompletely described this measure as a manufacturers' bill that limits compensation damages to the victim's economic loss and largely eliminates punitive damage awards.

This is not a manufacturer's bill and it is not a consumers' bill: It is, instead, a bill that recognizes and attempts to balance the intersts that both manufacturers and consumers have in changing the existing product liability litigation system. As a consequence, S. 1999 does limit victims' compensation damages to economic loss and does eliminate punitive damages; but only for those individuals who choose to use an alternative, expeditied claims system that products easier, more certain recovery—a claim system that, as presently drafted, imposes a presumption of liability on the manufacturer.

S. 1999 is a bill for manufacturers and consumers that have evolved over the past year out of efforts begun by Senator Kasten, Senator Gorton, and Senator Dodd. This proposal reflects views expressed at a series of "working group" meetings of business, consumer, and labor representatives that began last year. It has been shaped, too, by the many public comments received on the first draft of this proposal, released last July as "staff working draft No. 1."

What we really have before us today is "staff working draft No. 2." As I have often emphasized, I think the basic approach embodied in this bill is a sound one, but more work needs to be done. We have made considerable progress, but there remain many difficult questions that must be resolved.

Today, we begin to address some of these questions and we will discuss one of the most difficult issues before us—the appropriate liabaility standard or "trigger" for the alternative claim system. This is a difficult exercise. We must come up with a simple, workable, almost automatic standard that provides some limited compensation with little controversy or need for litigation. Perhaps, a more appropriate trigger than that now in the bill would not require a risk/utility analysis, but would look to see who was in a better position to avoid the risk.

Any trigger we come up with will have to look different from the liability standards we impose for traditional litigation and full recovery of damages. Such a trigger probably will cause manufacturers to complain that they will be paying too many claims, while consumers will complain that too few people will be paid too little.

Perhaps we will not be able to come up with a workable claim system liability standard or trigger. Then we will have to consider some of the other alternatives that will be discussed today. But if we are to have product liability reform at all, compromise will be required from manufacturers and consumers on this and other issues. I am confident that after these hearings we can produce fair and viable product liability reform legislation. We can establish a system that is better for manufacturers and consumers than the existing system, but difficult choices will have to be made by both manufactuers and consumers, and these choices will have to be made soon.

In closing I would like to read into the record a recent letter from Guido Calabresi, dean of the Yale Law School. In this letter, Dean Calabresi expresses his views on S. 1999 and some of the important issues that we will address today.

I want to just make one more comment and then read the letter into the record.

I have said before that I think this whole question of the difficulty of buying insurance, the difficulty of predicting what kinds of liability will be incurred is a matter which should really be a top priority, in my mind the top priority for this committee.

This has been a long effort already. Senator Kasten has been very, very active in it. The latest product, which is S. 1999, I think is really an excellent product. I think that it is a very good and responsible step forward in addressing this issue.

I do not think that this is a perfect bill. It is a bill that leaves a lot of room for further work, and I would encourage members of the committee and everyone else that is interested to continue in this process, but it seems to me that if we can move the cause along toward product liability legislation, we really would have done something important for the country.

Mr. Chairman, I have a letter that is dated February 21, 1986 from the Dean of Yale Law School, Guido Calabresi, who has been a man that for about a quarter of a century or more has been interested in this area. He was asked to testify today and he is not able to be here, but he did write a letter and I would like to read it with your permission.

The letter says:

> I have had occasion to look over S. 1999, the latest draft of product liability reform legislation. Since I will not be able to testify on February 26th and 27th, I thought I would take the liberty of writing you.
>
> While there are some parts of the bill which trouble me, I think the basic approach is a sound one. That basic approach I take to be the following:
>
> 1. The bulk of cases of injuries caused by products should be compensated, regardless of fault on the part of the manufacturer unless the user was in a better position than the manufacturer to decide between taking a risk and taking safety precautions. Even then, a manufacturer might be liable, if in retrospect, what led the product to cause the injury is something that could be cured at a reasonable cost, given the risk we now know it entails. The compensation given, however, should be limited to real economic loss.
> 2. The manufacturer may seek to avoid liability under this compensation provision, but if it seeks to do so, it subjects itself to the risk of higher damages.
> 3. The injured party may only in limited circumstances and in the presence of real fault, collect more than economic loss.
>
> There are things in the bill which get in the way of this basic schema. The trigger provision for liability is not, to my mind, sufficiently clear, and the incentives on both parties to settle for the compensation provision also do not seem to me to be quite right in the bill as written.
>
> I am afraid that these problems may lead to considerable litigation. Whether that will mean that some people who are seriously hurt by products will not get compensation even for economic loss, or that manufacturers will be led into situations where extra damages are paid, or both, I cannot say.
>
> My own sense, though, is that the simpler and more automatic are the compensation provisions which lead to net economic loss recovery—and only net economic loss recovery—the better off everyone will be.
>
> I will be in touch with people on your staff about some ideas I may have toward simplification. I will also talk to them about some problems I have with aspects of the handling of causation in the bill.
>
> There is a long way to go before this bill can really work. Nevertheless, I do want to emphasize again that I believe the underlying approach to be worthwhile and that reform is essential.

I think that that is a worthwhile contribution to our consideration. Again, Mr. Chairman, I want to thank you for holding this hearing and also state that I can think of nothing more important for our committee to do than to further the cause of product liability reform.

Senator KASTEN. Senator, thank you; and I want to thank you for your efforts and leadership and the fact that you and your staff and a number of people have been actively involved in putting together this latest effort at consensus building. I think it means that we will take a step forward. I think that without question, we are going to be able to move forward and I just appreciate the leadership and the help that you have provided.

Senator Gorton, do you have an opening statement?

Senator GORTON. I do not. I will be happy to proceed with listening to the witnesses.

Senator KASTEN. Senator Ford.

Senator FORD. I have no statement, Mr. Chairman. Thank you.

Senator KASTEN. Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

I will keep my opening remarks relatively brief. My views on the overall issue of product liability reform are well documented in the dozen or so previous hearings this committee has conducted on the issue.

Our present system is a mess. Manufacturing and innovation are being inhibited; liability insurance and litigation costs continue to drive up product prices; domestic and international trade is stifled; injured plaintiffs must wait years for recovery, most of which goes to the lawyers; and thousands of small businesses—indeed, entire industries—are being driven out of business every year. As it stands now, the only truly redeeming grace of the present system is that it provides a very good living for more lawyers than we could otherwise accomodate.

This is, I believe, the fourth attempt by this committee to go forward with truly meaningful product liability reform. Twice before we have passed a bill out of committee, but the full Senate has never had the opportunity to act on the matter. Mr. Chairman, I believe we can make it stick this time. For the sake of American businesses and the real consumers, I certainly hope so.

I have seen an increasing consensus coming from the grass roots level that Americans are tired of the endless lawsuits, the frivolous claims, and the inequities in the present system. They have seen the results of today's products liability system and are demanding reform. I have received literally thousands of letters on this issue. Every time I return to my State I hear constituents complain about the problems of liability insurance, increasing litigation, and product costs. They are demanding reform.

Mr. Chairman, I do have some detailed comments on S. 1999 and would like to have a more extensive statement submitted for the record immediately following my opening remarks, but I would like to touch just briefly on a few concerns now and follow up in more detail during the question and answer session later.

First, let me say that I certainly support the concept of this legislation and in all likelihood will be voting to report it favorably to the full Senate. It appears to be a good compromise that is capable of drawing strong support while still providing meaningful and effective relief. I do have a few minor concerns which will be discussed in more detail later today, and I hope to gain a better insight through today's hearing. Some concerns include:

1. *Joint and several liability.* I have expressed concern about this issue in the past and am pleased that S. 1999 at least contains some type of "comparative responsibility" provisions. Although I prefer a complete abolition of joint and several liability, I am anxious to hear from today's witnesses on that subject. As you know, I an considering an amendment in that area and will be exploring it in more detail later.

2. *Attorney fee disclosure.* Although I certainly support the concept of attorney fee disclsoures, I am not convinced that section 105 of the bill provides adequate or objective standards sufficient to address the problem. And although I am not exactly well known as the great defender of the bar, I do believe they and the courts deserve a clearer signal as to what the attorneys' duties and liabil-

ities are. As currently written, section 105 could lead to unwarranted legal malpractice lawsuits and increased insurance costs. Those are the very things we are trying to avoid.

3. *"Trigger" mechanisms.* As are many others, I am concerned about the "triggering" mechanisms and standards of proof in both the "alternative claim system" and the traditional tort system titles of this bill.

4. *Arbitration costs.* I am a bit concerned about the mandatory liability for arbitration costs imposed on the losing party under title II. My concern is twofold: (1) it may be an unfair disincentive for some claimants to require them to be liable for arbitration costs that in many cases would be in excess of the award; and (2) the mandatory nature of the costs may encourage the arbitrator to decide the case based on the burdens imposed by arbitration costs rather than on the merits of the case. I am particularly concerned about the impact this provision might have in rural or more sparsely populated areas in States like South Dakota. A "frivolous claim" standard might be more suitable.

5. *Reviewability.* Title II seems to limit judical review of arbitration proceedings to cases of fraud, misrepresentation, or similar misconduct. There may be constitutional and practical reasons to extend this reveiw, at least to questions of law.

There are a few more very minor concerns I have with the draft document, but let me emphasize that I have spent an inordinate amount of time highlighting my concerns. On balance, I am very encouraged with S. 1999 as a starting point to correct the very serious problems created by or present system. The staff and particularly Chairman Danforth are to be commended for shaping this historic piece of legislation. And finally, Senator Kasten is to be especially commended for this tenancity and leadership in this effort. I have enjoyed working with him and others over the years in an effort produce meaningful reform. I hope that today we are finally at the beginning of the end in our struggle to correct the longstanding inequities in this area of the law.

Senator KASTEN. Thank you.

Senator Kassebaum has another commitment but will be here later. She has an opening statement she would like to have inserted into the record.

[The statement and bills follow:]

OPENING STATEMENT BY SENATOR KASSEBAUM

Mr. Chairman, I am pleased to see the commitment of members of this subcommittee and the full Commerce Committee for the fundamental reform of product liability law. Our hearings on the liability insurance crisis and legislation to reform product liability law underscore the need for such reform. S. 1999 is a comprehensive and responsible outline of that reform and is, I believe, a significant step forward in the product liability reform debate.

I have long felt that our system of tort law, especially, in the area of product liability, needed attention. We have become a truly interstate economy and traditional product liability law has become unduly burdensome for manufacturers. General aviation manufacturers, farm equipment manufacturers, and many others have suffered this burden.

Perhaps even more importantly, the tort liability system has become increasingly inefficient in compensating injured parties.

The problem has aggravated the cyclical fluctuations in the property and casualty insurance industry, has deterred technological advancements in many fields, and has raised significantly the costs to consumers, businesses, and employees. We certainly have to fulfill our duties to see that victims of negligence receive full and just compensation. However, we also must fulfill our duty to develop a balanced system which recognizes the overall costs to our society.

As Senator Danforth has noted, S. 1999 is not the final word in product liability reform, nor will it solve all the problems faced today by U.S. manufacturers and insurers. I do believe, though, that our reform effort is a critical part of our effort to strengthen our economic performance.

I look forward to hearing from today's witnesses. My constituents want to see this legislation debated by the Senate. I hope we can work quickly to fine-tune S. 1999 so that it can be favorably reported to the floor.

99TH CONGRESS
1ST SESSION

S. 1999

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 20 (legislative day, DECEMBER 9), 1985

Mr. DANFORTH introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SEC. 101. This Act may be cited as the "Product Liability Voluntary Claims and Uniform Standards Act".

DEFINITIONS

SEC. 102. As used in this Act, the term—

(1) "capital good" means any product, other than a motor vehicle, or a vessel, aircraft, or railroad used

primarily to transport passengers for hire, or any component of any such product, if it is also of a character subject to allowance for depreciation under the Internal Revenue Code of 1954 and was—

(A) used in a trade or business;

(B) held for the production of income; or

(C) sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration, or other similar purposes;

(2) "claimant" means any person who submits an expedited product liability claim or brings a civil action subject to titles II or III of this Act, and any person on whose behalf such a claim is submitted or such an action is brought; if such a claim is submitted or such an action is brought through or on behalf of an estate, the term includes the claimant's decedent, or if it is brought through or on behalf of a minor or incompetent, the term includes the claimant's parent or guardian;

(3) "clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy such standard is more

than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt;

(4) "commerce" means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside of that State; or (B) which affects trade, traffic, commerce, or transportation described in clause (A);

(5) "commercial loss" means economic injury, whether direct, incidental, or consequential, including property damage and damage to the product itself, incurred by persons regularly engaged in business activities consisting of providing goods or services for compensation;

(6) "exercise of reasonable care" means conduct of a person of ordinary prudence and intelligence using the attention, precaution and judgment that society expects of its members for the protection of their own interests and the interests of others;

(7) "exposure" means proximity permitting absorption, ingestion or inhalation of a substance through any body surface;

(8) "harm" means (A) personal physical illness, injury, or death of the claimant; (B) mental anguish or emotional harm of the claimant caused by or causing

the claimant's personal physical illness or injury; and (C), for purposes only of title III of this Act, physical damage to property other than the product itself; the term does not include commerical loss;

(9) "manufacturer" means (A) any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product) and who designs or formulates the product (or component part of the product) or has engaged another person to design or formulate the product (or component part of the product); (B) a product seller with respect to all aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller produces, creates, makes, or constructs and designs or formulates, or has engaged another person to design or formulate, an aspect of a product (or component part of a product) made by another; or (C) any product seller not described in clause (B) which holds itself out as a manufacturer to the user of a product;

(10) "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity);

(11) "preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;

(12) "product" means any object, substance, mixture, or raw material in a gaseous, liquid or solid state (A) which is capable of delivery itself or as an assembled whole, in a mixed or combined state or as a component part or ingredient, (B) which is produced for introduction into trade or commerce, (C) which has intrinsic economic value, and (D) which is intended for sale or lease to persons for commercial or personal use; for the purposes of this Act, the term does not include (i) industrial waste, atmospheric pollutants, and water contaminants, (ii) human tissue, blood and blood products, or organs, or (iii) tobacco or alcoholic beverages sold for human consumption; and for the purposes of title II of this Act, any product purchased by the United States Government which is manufactured to United States Government design specifications for use in an aerospace or defense application.

(13) "product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, prepares, blends, packages, labels,

or otherwise is involved in placing a product in the stream of commerce, or who installs, repairs or maintains the harm-causing aspect of a product; the term does not include—

(A) a seller or lessor of real property;

(B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(C) any person who—

(i) acts in only a financial capacity with respect to the sale of a product; and

(ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

(14) "relevant point in time" means, for the purposes of title III of this Act, the earlier of the time of manufacture of a product or certification of an aircraft or its parts or accessories by the Federal Aviation Administration;

(15) "Secretary" means the Secretary of Commerce;

(16) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof;

(17) "toxic agent" means an object, substance, mixture, raw material, or physical agent producing or capable of producing toxic harm in humans; the term does not include genetic or other physiological predisposition to toxic harm or environmental background factors to which the general population is exposed;

(18) "toxic harm" means harm which is functional impairment, illness, or death of a human being resulting from exposure to an object, substance, mixture, raw material or physical agent of particular chemical composition.

PREEMPTION

SEC. 103. (a) This Act governs any civil action brought against a manufacturer or product seller, on any theory, for personal injury or property damage caused by a product. A civil action brought against a manufacturer or product seller for loss or damage to a product itself or for commercial loss is not subject to this Act and shall be governed by applicable commercial or contract law.

(b) No civil action may be brought in any Federal or State court against a manufacturer or product seller for personal injury or property damage caused by a product other than an action for recovery for harm brought pursuant to this Act.

(c) This Act supersedes any State law regarding recovery for any injury or damage caused by a product only to the extent that this Act establishes a rule of law applicable to any such recovery. Any issue arising under this Act that is not governed by any such rule of law shall be governed by applicable State or Federal law.

(d) Nothing in this Act shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;

(2) supersede any Federal law, except the Federal Employees Compensation Act;

(3) waive or affect any defense of sovereign immunity asserted by the United States;

(4) affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. 1602 et seq.);

(5) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation;

(6) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum; or

(7) supersede any statutory or common law, including an action to abate a nuisance, that authorizes a State or person to institue an action for civil damages or civil penalties, clean up costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief resulting from contamination or pollution of the environment, or the threat of such contamination or pollution.

(e) As used in this section, "environment" has the meaning given to such term in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(14)).

(f) This Act shall be construed and applied after consideration of its legislative history to promote uniformity of law in the various jurisdictions.

RECORD RETENTION

SEC. 104. A manufacturer of a product for which recovery may be sought under title II or subject to title III of this Act shall retain for a period of twenty-five years one copy of all studies or reports within the manufacturer's possession, custody, or control, which assess the risks or hazards posed by the design or formulation of the product. A manufacturer of such a product also shall retain for a period of twenty-five years a record of each reported incident of death, injury, or illness resulting or alleged to have resulted from the use of the product.

(b) Any claimant and any person who is a party to a civil action governed by this Act or who has notice that he or she may be made a party to such an action shall retain all material, documents and other data (including, in the case of the claimant, the product alleged to have caused the claimant's harm) within that person's possession, custody or control that are relevant or may lead to the discovery of evidence relevant to the claim or action.

(c) In any action governed by this Act, if the court determines that a party has willfully disposed of, destroyed, concealed, altered or removed any material, document or data in violation of subsection (a) or (b) of this section, there shall be a rebuttable presumption that the facts to which the material, document or data relate are established in a manner adverse to the position of the party who has committed the violation. The court shall assess a civil penalty against such party in an appropriate amount not less than $1,000 and order such party to pay the other party's costs, including reasonable attorney's fees, incurred in providing the violation.

(d) In any action governed by this Act, if the court determines that a party has nonwillfully violated subsection (a) or (b) of this section, and that no other means are available to establish the facts to which the unavailable material, document or data relate, the court may, in the interest of justice, establish a rebuttable presumption that the facts to which the material, document or data relate are, for the purposes of such action, established in a manner adverse to the party who has committed the violation.

ATTORNEY DISCLOSURE

SEC. 105. (a) As used in this section, the term—

(1) "attorney" means any natural person, professional law association, corporation, or partnership authorized under applicable State law to practice law; and

(2) "client" means any person who consults or seeks to retain an attorney in connection with a claim or civil action brought under or subject to this Act.

(b) An attorney who is contacted by a client inquiring about rights of recovery for harm caused by a product or seeking to engage the attorney's services in connection with a claim or civil action brought under or subject to this Act shall provide the client with—

(1) an explanation of the options specified in titles II and III of this Act for recovery for harm caused by a product, including—

(A) the elements of proof and potential recovery under such options;

(B) the time periods specified in this Act for payment if the client submits an expedited claim under title II of this Act;

(C) the length of time that is likely to be required for the client's recovery in a civil action under title II or title III of this Act; and

(D) an estimate of the likelihood of the client's recovery pursuant to such options; and

(2) an estimate of the attorney's time, fees, and expenses, and all other potential costs, expenses, and penalties payable or to be paid by the client seeking recovery under title II or pursuant to title III of this Act.

(c) If an attorney fails to disclose to a client the information required by this section, the client may bring a civil action for damages in the court in which an action under title III of this Act was or could have been brought. An attorney who fails to make the disclosure required by this section shall be liable for any loss caused the client by such failure and for exemplary damages in the amount of the client's net economic loss, as defined in section 202 of this Act. The provisions of this section shall be in addition to and not in lieu of any other available remedies or penalties.

SERVICE OF PROCESS

SEC. 106. The summons and complaint in any action brought under or subject to this Act shall be served as provided by the applicable law or rules of the court where such action is brought, except that the delivery of the summons and complaint upon the defendant or the defendant's agent as required by applicable State or Federal rules may be made by certified mail, return receipt requested, whether within or beyond the territorial limits of the State in which the action is brought.

ADMISSIBILITY OF CERTAIN EVIDENCE

SEC. 107. Evidence that a manufacturer or product seller has admitted liability, expressly or impliedly, or has made payment to a claimant for harm caused by a product under title II of this Act shall not be admissible in any other action brought under or subject to this Act or otherwise by another claimant.

EXPERT OPINION

SEC. 108. For the purposes of this Act, expert scientific or medical opinion is not sufficient evidence to establish any fact unless such opinion has support in peer-reviewed scientific or medical studies.

SUBSEQUENT REMEDIAL MEASURES

SEC. 109. In an action governed by this Act, evidence of any measure taken by a manufacturer or product seller after the occurrence of a claimant's harm which, if taken previously, would have made the harm less likely to occur is not admissible to prove liability. Such evidence may be admitted when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

PRODUCT LIABILITY REGISTRY

SEC. 110. (a) Any manufacturer who is not incorporated or registered to do business under the law of a State shall appoint an agent for service of process in the United States upon whom service of process may be made pursuant to section 106 of this title and claims presented pursuant to section 201 of title II of this Act. Any such manufacturer shall transmit notice of the appointment of such an agent and of the agent's address to the Secretary, in accordance with regulations promulgated by the Secretary.

(b) The Secretary shall maintain a registry of agents appointed pursuant to subsection (a) of this section, and shall furnish the name and address of any agent to any person requesting such name and address for the purpose of making service of process or submitting a claim under this Act.

(c) Not later than twelve months after date of enactment of this Act, the Secretary shall promulgate regulations establishing financial-responsibility requirements for manufacturers who are required by subsection (a) of this section to appoint an agent for service of process. Financial responsibility may be established in accordance with such regulations by insurance, guaranty, surety bond, or letter of credit, or any combination thereof.

(d) Any manufacturer who fails to comply with a provision of this section or a regulation issued under this section shall be liable to the United States for a civil penalty in an amount not to exceed $5,000 for each day of such non-compliance. Such civil penalty shall be assessed by the Secretary by the issuance of an order made on the record after opportunity for a hearing in accordance with section 554 of title 5, United States Code. The amount of such penalty when finally determined may be deducted from any sums owed by the United States to the person charged. Any person who requested a hearing respecting the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit within the thirty-day period beginning on the date the order making such assessment was issued. If any person fails to pay such an assessment after the order to pay such penalty becomes a final order or, where a petition for judicial review has been filed, after the court has entered final judgment in favor of the Secretary, the Attorney General shall recover the amount assessed, plus interest at currently prevailing rates, in an action brought in an appropriate district court of the United States. In such an action, the validity, amount and appropriateness of the penalty shall not be subject to review.

PRODUCT LIABILITY REVIEW PANEL

SEC. 111. (a) In order to carry out the purposes of this section, there shall be established a Product Liability Review Panel (hereinafter referred to as the "Review Panel"). The Review Panel shall be composed of three members selected by the Judicial Conference of the United States on the basis of their expertise regarding civil actions and recovery for personal injury or property damage caused by products, and four members selected by the National Academy of Sciences on the basis of their expertise regarding economic, medical, and scientific aspects of the subject matter of the study. A chairman and a reporter shall be selected from among the seven members of the Review Panel.

(b) The Review Panel shall conduct a study to assess the expedited procedures and remedies provided by title II of this Act. As part of such study, the Review Panel shall evaluate—

(1) the adequacy of such procedures and remedies in providing fair compensation in a prompt and cost-effective manner for harm caused by products, including toxic harm caused by exposure to products, and harm, whether toxic or nontoxic, caused by drugs and medical devices used in human health care, as well as by other products;

(2) the scope of the evidentiary burdens placed on claimants under title II of this Act in proving the causes of harm, including toxic harm, particularly in light of scientific uncertainty regarding causation of certain human health effects;

(3) the availability and cost of product liability insurance for claims under title II of this Act;

(4) the costs imposed on claimants, manufacturers, and the judicial system by the procedures and remedies provided by title II of this Act; and

(5) the success of the procedures and remedies set forth in titles II and III of this Act in providing both incentives for product safety and adequate compensation for persons harmed by defective products.

(c) The Review Panel shall conduct such hearings, conferences or public forums as are necessary to assure adequate public participation in its proceedings.

(d) Within thirty-six months after the date of enactment of this Act, the Review Panel shall submit to the Congress a report containing the results of the study required by this section, with appropriate recommendations. Such recommendations shall address specifically the need to amend or supplement the provisions of this Act.

(e) A member of the Review Panel who is not an officer or employee of the Federal Government shall be entitled to receive compensation at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule pursuant to section 5332 of title 5, United States Code, for each day (including traveltime) during which the member is engaged in the actual performance of the duties of the Review Panel.

(f) There are authorized to be appropriated for the purposes of this section such sums as may be necessary. Such sums shall remain available until expended.

EFFECTIVE DATE

SEC. 112. (a) This Act shall be effective on the date of its enactment and shall apply to all expedited claims submitted pursuant to title II of this Act on or after that date and all civil actions subject to title III of this Act commenced on or after that date, including any claim or action in which the harm or the conduct which caused the harm occurred before the effective date.

(b) If any provision of this Act would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, submit an expedited claim to such a manufacturer or bring any civil action governed by this Act within one year after the effective date of this Act.

TITLE II

EXPEDITED PRODUCT LIABILITY CLAIMS PROCEDURE

SEC. 201. (a) A person who has suffered harm caused by a product, other than an employee of the product's manufacturer who suffers such harm in the course of his employment, may submit an expedited claim under this title to the manufacturer, except that no claim for harm occurring outside of the United States may be brought under this title by a person who is not a citizen of the United States.

(b) A person who submits such a claim under this title for harm caused by a product may not seek recovery for damages arising from the same harm in a civil action governed by title III of this Act, if the manufacturer—

(1) makes payment of net economic loss to the claimant, pursuant to section 206(b) or 209(a) of this title;

(2) declines to make full payment solely because of a dispute over the amount of net economic loss, pursuant to section 206(d) or 209(b) of this title; or

(3) declines liability for the claimant's harm or fails to respond as required by section 206(a) of this title, and the claimant seeks recovery for the harm pursuant to section 208 of this title.

(c) No person may submit an expedited claim to a manufacturer under this title if there is pending against the manufacturer a civil action brought by such person under any theory, under any law, to recover damages for the same harm.

(d) In the absence of a prior written agreement to the contrary, a manufacturer who makes payment under this title for damages caused by a product or who is found not liable for such harm under section 208 of this title may not be made a defendant in any action brought by any other party for contribution, reimbursement, or indemnity for damages arising from the same harm.

(e) Payment of an expedited claim for harm under this title or a finding of nonliability under this title shall not bar an action governed by title III of this Act for associated harm which is physical damage to property other than the product itself.

MANUFACTURER'S LIABILITY FOR NET ECONOMIC LOSS

SEC. 202. (a)(1) As used in this title, the term "net economic loss" means—

(A) reasonable expenses incurred for reasonably needed and used medical and rehabilitation care and services;

(B) lost income from work which the claimant would have performed if the claimant had not suffered harm, reduced by any income earned from substitute work actually performed by the claimant or by income the claimant would have earned in available appropriate work which the claimant was capable of performing but unreasonably failed to undertake;

(C) reasonable expenses incurred in obtaining ordinary and necessary services in lieu of those the claimant would have performed, not for income, but for the benefit of the claimant or the claimant's immediate family, if the claimant had not suffered the harm;

(D) lost earnings of a deceased person who suffered fatal harm caused by a product which, if the person had not died, would have been contributed to claimants who are entitled to receive benefits by reason of such person's death under the law of the place where the deceased person was domiciled; and

(E) reasonable expenses incurred by the claimant in preparation and submission of a voluntary expedited claim prior to the date on which notice is given by the manufacturer pursuant to section 206(b), 206(d), or 209 of this title, including a reasonable attorney's fee,

less the total amount of compensation for economic loss paid or payable to the claimant by reason of the same harm from any other source, including any such compensation paid or payable under any government program (including workers' compensation) or employee benefit plan, or pursuant to any private insurance policy or program or any prepaid medical benefit plan.

(2) The lost income taken into account under paragraph (1)(B) of this subsection shall be reduced by the amount of all Federal, State, and local income taxes and any Social Security or other payroll taxes which would be applicable to such income, but which would not be applicable to compensation paid under this title.

(b) A manufacturer's liability under this title for harm caused by a product is limited to the claimant's net economic loss resulting from such harm.

(c) Where harm occurs in circumstances that might entitle a claimant to benefits (including workers' compensation benefits) which would reduce the amount of the claimant's net economic loss in accordance with subsection (a)(1) of this section and it cannot reasonably, within the time provided for payment of net economic loss under section 206(a) of this title or any reasonable extension of such time, be determined whether or in what amount such benefits will be payable, the manufacturer shall place in an interest-bearing escrow account that portion of the economic loss which the manufacturer reasonably anticipates the claimant will receive from such other sources, until the claimant's right to such benefits and the amount of such benefits finally has been determined under applicable law.

(d) The total amount of compensation for economic loss paid or payable to a claimant from any other source shall, for purposes of subsection (a) of this section, be reduced by the amount of legal fees and other costs incurred by the claimant in collecting such compensation.

(e) Attorney's fees may be on a contingent basis but, for the purposes of subsection (a) of this section, shall be calculated on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and experience and the complexity of the case.

(f) Except as otherwise provided by any provision of Federal law, no program of compensation, whether public or private, the benefits of which would be deducted from claimant's economic loss in order to calculate net economic loss under this section, may make payment of benefits secondary to payment of net economic loss by a manufacturer under this title.

SUBMISSION OF AN EXPEDITED CLAIM

SEC. 203. (a) Within ten days of receipt of notice of injury alleged to have been caused by a product, a manufacturer shall provide persons seeking to recover for harm caused by a product with a clear and comprehensive written explanation of their rights under this Act, including their right of representation by counsel, and with any forms required for filing an expedited claim. Within one hundred twenty days of the effective date of this Act, the Secretary shall make available a model explanation of such rights and model forms. A manufacturer who provides a claimant with copies of such explanation and forms shall be deemed to have satisfied the requirements of this subsection.

(b) A person seeking to recover under this title from a manufacturer for harm caused by a product shall submit an expedited claim by certified mail, return receipt requested, to the manufacturer.

(c) In order to be deemed a complete claim for purposes of section 206 of this title, a claim submitted to the manufacturer pursuant to subsection (b) of this section must be accompanied by—

(1) except as provided in subsection (d) of this section, reasonable proof that the manufacturer made the individual product unit that caused the harm;

(2) full information regarding the date, place, and time of the harm's occurrence, the cause, nature and extent of the harm, and the nature and the amount of economic loss caused by the harm;

(3) copies of all bills for which payment is sought, including medical bills;

(4) copies of all medical reports or records within the possession of the claimant relating to the harm for which recovery is sought;

(5) a statement of lost income for which recovery is sought;

(6) the name and address of any other source of compensation paid or payable to the claimant for such economic loss, and the amount of any such compensation; and

(7) an affirmation or declaration, under penalties of perjury, that, to the best of the claimant's knowledge, the information provided with the claim is accurate.

(d) Any person seeking to recover under this title for toxic harm of a kind which manifests itself only many years after exposure may, where it is not possible for such person, despite every reasonable effort, to identify the manufacturer of the individual product unit that caused the harm, submit a product liability claim in accordance with the provisions of this section to any manufacturer of a product that is identical and chemically indistinguishable from the product which caused the harm if that manufacturer's product was available at the time when, and in the market in which, the product that caused the harm was purchased. In addition to the information required by subsection (c) of this section, the claimant shall provide the manufacturer with an adequate explanation of its inability to identify the manufacturer of the individual product unit which caused the toxic harm.

(e) An expedited claim under this section must be submitted within two years of the time the claimant discovered or in the exercise of reasonable care should have discovered the harm and its cause, except that a claim of a person under legal disability may be submitted within two years after the disability ceases.

DUTY TO DISCLOSE INFORMATION

SEC. 204. (a) A claimant shall, as a condition to recovery under this title—

(1) cooperate fully and expeditiously with the manufacturer in its reasonable investigation of the circumstances of the harm and of the net economic loss claimed as a result of such harm; and

(2) promptly update during the course of the manufacturer's investigation all medical information and information relevant to the calculation of net economic loss previously furnished pursuant to section 203(c) of this title.

(b) In addition to the information to be furnished pursuant to section 203(c) of this title, the claimant shall, upon request, deliver to the manufacturer a copy of every written report made before or after the date of request, which is available to the claimant and is not otherwise available to the person making the request, concerning any relevant medical treatment or examination of the claimant. In addition, the claimant shall, upon request, deliver to the manufacturer the names and addresses of all physicians, hospitals and other persons examining, diagnosing, treating, or providing services to the claimant in connection with the harm or any other relevant past injury. The claimant shall authorize the person making such request to inspect all relevant records made by such persons.

(c) Any person (other than the claimant) providing information pursuant to this section shall be entitled to reimbursement from the requesting party for costs reasonably incurred in providing such information.

LIABILITY FOR HARM

SEC. 205. (a) Where an expedited claim has been submitted to a manufacturer in accordance with section 203 of this title, the manufacturer is liable to the claimant, to the extent provided in section 202 of this title, if—

(1) the product, when it left the control of the manufacturer, was unreasonably dangerous; and

(2) the unreasonably dangerous aspect of the product was a proximate cause of the claimant's harm while the product was being used in a manner and for a purpose intended by the manufacturer or which could be reasonably anticipated by the manufacturer,

unless the claimant acted in some material respect in a manner which was a gross failure to exercise reasonable care.

(b) A product is unreasonably dangerous for purposes of this section unless the manufacturer of the product establishes by a preponderance of the evidence that—

(1) the product's utility so outweighs the risk of the harm caused the claimant that a person knowing of such risk would, nonetheless, in the exercise of reasonable care, be justified in placing a product so constructed, designed, or formulated in the stream of commerce; and

(2)(A) the risk of the harm caused the claimant would either have been apparent to a reasonably observant person or would have been a matter of common knowledge to persons in the claimant's situation; or

(B) if the risk of the harm caused the claimant would not have been apparent to a reasonably observant person or would not have been a matter of common knowledge to persons in the claimant's situation, that (i) if the risk in question was avoidable, the manufacturer provided a warning or instruction adequate to enable a person exercising reasonable care to avoid the risk, or (ii) if the risk in question was unavoidable, the manufacturer provided information adequate to permit a person exercising reasonable care to make an informed decision whether to assume the risk.

(c)(1) A product which is a drug or a device which may only be or is, in fact, only administered, applied, used or dispensed by a practitioner licensed by law to administer, apply, use or dispense such drugs or devices is not unreasonably dangerous for purposes of this section, if the manufacturer has taken reasonable steps to provide such practitioner with warnings and instructions with respect to the harm in question which are in compliance with the requirements of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.).

(2 For the purposes of this subsection, the term—

(A) "device" has the meaning given to such term in section 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(h)); and

(B) "drug" has the meaning given to such term in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)).

(3) A determination by the Food and Drug Administration that a warning or instruction complies with the requirements of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) is conclusive evidence of such compliance.

(d)(1) If a claimant has suffered toxic harm of a kind which manifests itself only many years after exposure, a product shall be presumed conclusively for purposes of subsection (a) of this section to have been a proximate cause of the claimant's toxic harm, if—

(A) the claimant was exposed to the product at a relevant time; and

(B) in the best available scientific opinion, the claimant's exposure to a product of such chemical composition, in the circumstances, would significantly increase the risk of incurring the toxic harm suffered by the claimant, unless another toxic agent is more likely than the product at issue to have independently produced claimant's toxic harm.

(2) An increase in the risk of incurring a particular toxic harm as a result of a particular exposure would be significant for the purposes of this subsection if the incidence of such harm in an exposed population were to exceed the incidence in nonexposed populations by 30 per centum or more.

(e) A determination of the National Toxic Health Effects Panel established by section 213 of this title that, in the best available scientific opinion, exposure to a product of a certain chemical composition would or would not in particular circumstances significantly increase the risk of incurring a particular toxic harm shall be conclusive evidence of that fact for purposes of subsection (d) of this section, in the absence of fraud or similar misconduct on the part of such Panel or one or more of its members. In the absence of such a relevant determination of such Panel, the claimant must establish by a preponderance of the evidence that, in the best available scientific opinion, exposure to a product of a certain chemical composition, in the circumstances of the claimant's case, significantly increased the claimant's risk of incurring the toxic harm suffered by the claimant.

PAYMENT OR REJECTION OF AN EXPEDITED CLAIM

SEC. 206. (a) Within ninety days of receipt of a complete expedited claim submitted under section 203 of this title (unless a longer period is agreed to by the claimant), a manufacturer shall determine whether it is liable for the harm complained of by the claimant and give notice to the claimant as provided in this section.

(b) If a manufacturer decides not to contest liability for such harm, it shall so notify the claimant and either (1) make payment to the claimant for such net economic loss payable pursuant to section 202 of this title as has arisen to date from that harm, or (2) enter into an agreement with the claimant for other mutually acceptable disposition of the claim and any supplemental claims that might be filed under section 209 of this title.

(c) If the manufacturer determines that it is not liable for such harm, it shall give the claimant written notice of rejection of the claim and the reasons for such rejection, together with a written explanation of the claimant's rights under section 208 of this title. Within one hundred and twenty days of the effective date of this Act, the Secretary shall make available a model explanation of such rights. A manufacturer who provides a claimant with copies of such explanation shall be deemed to have satisfied the requirements of this subsection.

(d) If a manufacturer decides not to contest liability for such harm but declines to make full payment of the claim because of a dispute over the amount of net economic loss, the manufacturer shall notify the claimant of such determination. The manufacturer shall pay the undisputed portion of the claim, if any, and provide the claimant with a written explanation of the claimant's rights under section 207 of this title. Within one hundred and twenty days of the effective date of this Act, the Secretary shall make available a model explanation of such rights. A manufacturer who provides a claimant with copies of such explanation shall be deemed to have satisfied the requirements of this subsection.

RIGHTS UPON DENIAL OF FULL PAYMENT

SEC. 207. (a) If a manufacturer has advised a claimant that it declines to make full payment of an expedited claim submitted under this title solely because of a dispute over the amount of net economic loss, the claimant may, within ninety days of such notice, initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from a roster of arbitrators maintained by the Service for such purpose. The manufacturer shall submit to such arbitration and shall be bound by any final determination of such proceedings.

(b)(1) The Service shall adopt procedures and rules applicable to the selection of arbitrators and to the conduct of arbitration proceedings under this section. In order that such proceedings may be expeditious, informal, and reasonably inexpensive in cost, the Service's rules shall provide, among other provisions, that unless agreed otherwise by the parties—

(A) no prehearing discovery shall be permitted;

(B) any hearing shall be held in the community in which the claimant resides;

(C) the matter may, upon the request of the claimant, be submitted to the arbitrator for decision without written posthearing briefs;

(D) the arbitrator shall hear the case within sixty days after the date of the arbitrator's appointment and render a decision within thirty days after submission of the case for decision; and

(E) in a case in which a claimant is represented by counsel, the arbitrator may award the claimant only either the amount sought by the claimant at the start of the hearing or the amount last offered by the manufacturer at the start of the hearing.

(2) The findings and determinations of the arbitrator shall be in writing and shall be final and conclusive. Such findings and determinations shall be enforceable in any court of competent jurisdiction. No official or court of the United States shall have power or jurisdiction to review any such findings and determinations except where there is alleged fraud, misrepresentation, or similar misconduct by one of the parties to the arbitration or the arbitrator and where there is a verified complaint with supporting affidavits attesting to specific instances of fraud, misrepresentation, or other misconduct.

(c) If the arbitrator finds that the claimant was the substantially prevailing party, the arbitrator shall increase the amount of net economic loss payable to the claimant by reasonable attorney's fees and expenses incurred in connection with the arbitration proceeding.

(d) The manufacturer shall pay the fee and expenses of the arbitrator, except that if the arbitrator finds that the manufacturer was the substantially prevailing party, the manufacturer shall be entitled to recover from the claimant all such sums paid to the arbitrator.

(e) Arbitration under this section shall be a claimant's exclusive remedy where the manufacturer declines to make full payment of an expedited product liability claim because of a dispute over the amount of claimant's net economic loss.

RIGHTS UPON DENIAL OF LIABILITY

SEC. 208. (a) If a manufacturer gives notice to a claimant pursuant to section 206(c) of this title that it is not liable for the claimant's harm, or if a manufacturer fails to respond to a claim as required by section 206(a) of this title, the claimant may bring a civil action for an order enforcing the claimant's rights under this title. If notice of rejection has been provided to a claimant in accordance with section 206(c) of this title, the issues at trial shall be limited to those issues raised by the claimant and set forth in such notice. All issues shall be tried by the court without jury. Such an action must be brought within one year of the date of submission of the claim under section 203 of this title or within ninety days of the manufacturer's rejection of the claim, whichever is later.

(b) A claimant may bring an action under subsection (a) of this section—

(1) in an appropriate court of the State in which the harm occurred or in which the claimant resides, and such action shall be governed by the provisions of this Act; or

(2) in accordance with section 1332 of title 28, United States Code, in the district court of the United States for the district in which the claimant resides or in which the harm occurred, but the district courts of the United States shall not, by virtue of sections 1331

or 1337 of title 28, United States Code, have jurisdiction over any civil action brought under this title.

(c) An action brought under subsection (a) of this section shall be expedited in every way and, if brought in a State court, may be removed by the plaintiff to the district court of the United States for the district and division embracing the place where such action is pending if such action is not called for trial within one hundred and eighty days after the date of commencement of such action. Upon such removal, the parties shall be limited to thirty days for discovery, unless the parties agree otherwise.

(d) If, in an action brought under subsection (a) of this section, the claimant establishes by a preponderance of the evidence either that the manufacturer failed to respond to the claim in the manner and within the time required by section 206 of this title, or that the manufacturer is liable to the claimant under section 205 of this title, the court shall—

(1) enter an order enforcing the claimant's rights under this Act and directing arbitration pursuant to section 207 of this title of any dispute over the amount of net economic loss payable to the claimant; and

(2) award reasonable attorney's fees and expenses incurred in connection with the action and interest on the amount of the claimant's net economic loss (subject to the arbitrator's determination) equal to 2 per centum

per month for each month after the notice period specified in section 206(a) of this title that net economic loss remains unpaid.

(e)(1) If, in an action brought under subsection (a) of this section, the court finds that there was not good cause for the manufacturer's—

(A) denial of liability to a claimant pursuant to section 206(c) of this title; or

(B) failure to respond to the claim in the manner and within the time required by section 206 of this title,

the court shall, without regard to whether it enters an enforcement order, award exemplary damages in an amount not to exceed twice the amount of the net economic loss sought by the claimant or $10,000, whichever is greater.

(2) If, in an action brought under subsection (a) of this section, the court finds that there was not good cause for the claimant to file such action, the court shall require the claimant or claimant's attorney to pay all of the manufacturer's costs of investigating and defending the claim.

(3) For the purposes of this subsection, the term "good cause" means that cause which, to a person of ordinary intelligence and care, and irrespective of any subsequent judicial determination with respect to the manufacturer's liability to a claimant, would be a reason sufficient to justify the manufac-

turer's denial of liability to a claimant or failure to respond to a claim, or the claimant's filing of a claim under this title.

(f) A person who willfully violates an enforcement order entered under this section or an order of an arbitrator entered under section 207 of this title shall upon conviction be subject to a fine of not more than $2,000 for each day of such violation, or imprisonment not to exceed two years, or both.

(g) Any settlement of a claim to which the parties agree after an action has been brought under this section must be approved by the court, which may adjust the amount of settlement by the amount of any penalties which the court finds appropriate in accordance with subsections (d)(2), (e), and (f) of this section.

SUPPLEMENTAL EXPEDITED CLAIMS

SEC. 209. (a) If, after a manufacturer has acknowledged liability or has been determined to be liable on an expedited claim submitted under section 203 of this title, the claimant incurs additional net economic loss arising from the same harm, the claimant may, unless barred by the terms of a settlement agreement entered into pursuant to section 206(b) of this title, submit to that manufacturer supplemental expedited claims for net economic loss. Within seventy-five days after receipt of a supplemental expedited claim, the manufacturer shall determine whether, under the applicable standards of this title, it is obliged to make payment of the additional net economic loss described in the claim. If the manufacturer decides not to contest liability for such payment, it shall proceed in accordance with the provisions of section 206(b) of this title. If the manufacturer determines that it is not liable for such payment, it shall proceed in accordance with the provisions of section 206(c) of this title, and the claimant shall have such rights and remedies as are provided by section 208 of this title.

(b) If a manufacturer does not contest liability but declines to make full payment of a supplemental expedited claim submitted under this section, the manufacturer shall advise the claimant of that fact in writing. The claimant may, within ninety days of such notice, initiate arbitration under the procedures specified in section 207 of this title.

TIME LIMITATION ON LIABILITY

SEC. 210. Any civil action under section 208 of this title shall be barred, if a product which is a capital good is alleged to have caused harm which is not toxic harm, unless the expedited claim was submitted within twenty-five years of the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or using the product as a component in the manufacture of another product.

REIMBURSEMENT OF MANUFACTURER

SEC. 211. (a)(1) Subject to the provisions of this subsection, any manufacturer who has paid an expedited claim or supplemental claim for harm caused by a product under this title may, within two years of such payment, seek and obtain contribution, reimbursement, or indemnity on the basis of comparative responsibility from any other person (other than the claimant's employer or fellow employees) from whom the claimant might have had recovery for the harm, whether under this Act or otherwise. Recovery of damages under this section shall be in proportion to the percentage of such person's responsibility for the harm.

(2) If an action is brought under this section against another manufacturer (other than the claimant's employer) who would have been liable to the claimant under section 205 of this title, such action shall be governed by the standards of liability set forth in section 205 of this title.

(3) If an action is brought under this section against any other person (other than the claimant's employer or fellow employee) and such action is a product liability action, as defined in section 301 of this Act, such action shall be governed by the standards of liability set forth in sections 302 and 303 of this Act; however, in order to prevail against a product seller who is not a manufacturer, the manufacturer must establish by a preponderance of the evidence that the failure of such product seller to exercise reasonable care was a proximate cause of the harm complained of by the claimant and that such product seller's percentage of responsibility for

the harm was greater than the manufacturer's percentage of responsibility for the harm.

(4) If an action is brought under this section against another person (other than the claimant's employer or fellow employee) whose failure to exercise reasonable care was a proximate cause of the harm complained of by the claimant and the action is not a product liability action, as defined in section 301 of this Act, such action shall be governed by applicable standards of liability under State or Federal law.

(b) With respect to an expedited claim for toxic harm paid pursuant to section 203(d) of this title, a manufacturer may recover on an equitable basis from any other manufacturer of a product that is identical to and indistinguishable in chemical composition from the product of the manufacturer who paid such claim, if the product of such other manufacturer was available at the time when, and in the market in which, the product that caused the claimant's toxic harm was purchased.

(c) A manufacturer may seek such contribution, reimbursement, or indemnity—

(1) where a claim was paid pursuant to section 203 of this title, either in the appropriate court of a State in which jurisdiction over the parties may be had or, if the requirements of section 1332 of title 28,

United States Code, are satisfied, in an appropriate district court of the United States; or

(2) where payment was made as a result of a final judgment in a civil action under this title, in the court which had jurisdiction over such civil action.

(d) Neither the claimant's employer nor any insurer shall have any right of subrogation, contribution, or indemnity against the manufacturer or product seller or any lien on the claimant's recovery from the manufacturer or product seller, nor shall the manufacturer or product seller have any right of contribution or indemnity against the claimant's employer or fellow employee, except as provided in section 202 of this title.

COLLECTIVE PROCESSING OF CLAIMS

SEC. 212. Nothing in this title or in the antitrust laws of the United States or of any State shall preclude manufacturers or product sellers from establishing and maintaining collective means of and facilities for processing claims which are submitted under this title.

NATIONAL TOXIC HEALTH EFFECTS PANEL

SEC. 213. (a) The National Toxic Health Effects Panel (hereinafter referred to as the "Health Effects Panel") shall be composed of nine members who shall be career employees of the Public Health Service within the Department of Health and Human Services. Such members shall be appointed by the Secretary of Health and Human Services. The Secretary shall designate one of the members of the Panel to serve as Chairman. Each member shall be a person who, as a result of medical or other scientific training and experience, is exceptionally well qualified to analyze and assess the risks to human health associated with exposure to toxic substances. The members of the Health Effects Panel shall include at least one epidemiologist, one toxicologist, one industrial hygienist, and one physician.

(b)(1) Except as provided in paragraph (2) of this subsection, three of the members first appointed under this section shall be appointed for a term of two years, three for a term of four years and three for a term of six years, the term of each to be designated by the Secretary. Each of their successors shall be appointed for a term of six years from the date of expiration of the term for which his predecessor was appointed.

(2) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall serve only for the remainder of such term. A member may continue to serve after the expiration of his term until his successor has taken office. A vacancy on the Health Effects Panel shall not impair the right of the remaining members to discharge their responsibilities under this section.

(c)(1) The Health Effects Panel shall—

(A) compile and evaluate relevant information and issue guidance, after opportunity for public comment, for use by claimants, manufacturers and the courts in processing claims for toxic harms under this title; and

(B) determine generically, on its motion or in response to a petition submitted to it under subsection (d) of this section, whether in the best available scientific opinion, taking into account epidemiological studies, histological data, experimental evidence, and other relevant scientific data, exposure to a product of particular chemical composition, in particular circumstances, would or would not significantly increase the risk of incurring a toxic harm.

Such determination shall be made by a division of three members of the Health Effects Panel, except that the Health Effects Panel may, by a vote of four of its members, order reconsideration of any determination by the entire Health Effects Panel.

(2) An increase in the risk of incurring a particular toxic harm as a result of a particular exposure would be significant for the purposes of this subsection if the incidence of such harm in an exposed population were to exceed the incidence in nonexposed populations by 30 per centum or more.

(d)(1) Any claimant, prior to making a claim under this title, and any manufacturer, immediately upon the filing of a claim under this title, may petition the Health Effects Panel for a determination or for reconsideration of a previous determination. When a petition has been submitted by a potential claimant within two years of the time the claimant discovered or, in the exercise of reasonable care, should have discovered the harm and its cause, the period for filing a claim under section 203 of this title shall be extended by the period of the Health Effects Panel's proceeding. When a petition has been submitted by a manufacturer, the ninety-day period for payment or rejection of the claim specified in section 206(a) of this title shall commence with completion of the Health Effects Panel's proceeding, but not later than six months from the date of submission of a claimant's claim under section 203 of this title, unless otherwise agreed by the claimant.

(2) Any petition shall be accompanied by a disclosure, in such form as the Health Effects Panel specifies, of all relevant information known to the petitioner concerning the toxicity of the product in question.

(3) In any judicial proceeding or arbitration under this title, findings of the Health Effects Panel shall be conclusive and shall not be subject to collateral challenge, except for fraud or similar misconduct on the part of the Health Effects Panel or one or more of its members.

(e) The Secretary shall provide the Health Effects Panel with such administrative support services as may be necessary for carrying out its functions under this Act.

(f) Notwithstanding any other provision of law, agencies and departments of the Federal Government shall provide the Health Effects Panel with such information and data as the Health Effects Panel, through the Secretary, may request. The Health Effects Panel may also, through the Secretary, require the production by States, industry and other private sources of such information as it may require to carry out its responsibilities. In the case of contumacy, or failure or refusal of any person to obey such an order, any district court of the United States or the United States Court of any territory or possession within the jurisdiction of which such person is found, resides or does business, shall, upon application of the Secretary, have jurisdiction to issue to such person an order to produce such information. Any failure to obey such order of the court shall be punishable by such court as contempt thereof.

(g) There are authorized to be appropriated for the purposes of this section such sums as may be necessary. Such sums shall remain available until expended.

TITLE III

CIVIL ACTIONS

SEC. 301. A person seeking to recover for harm caused by a product may bring a civil action against the product's manufacturer or product seller pursuant to applicable State or Federal law, except to the extent such law is superseded by this title. By bringing such a civil action, a person waives all rights to recovery for the same harm under the expedited claim procedure of title II of this Act.

UNIFORM STANDARDS OF MANUFACTURER LIABILITY

SEC. 302. (a) In a civil action subject to the provisions of this title, a manufacturer is liable to a claimant only if the claimant establishes by a preponderance of the evidence that—

(1) an individual product unit manufactured by the manufacturer was a proximate cause of the harm complained of by the claimant; and

(2)(A) the manufacturer was negligent in constructing the product (as provided in subsection (b) of this section), in designing or formulating the product (as provided in subsection (c) of this section), or in providing warnings or instructions about a danger connected with the product or about the proper use of the product (as provided in subsections (d) and (e) of this section), or (B) that the product did not conform to an express warranty made by the manufacturer with respect to the product (as provided in subsection (g) of this section).

(b) A manufacturer has been negligent in constructing a product if, when the product left the control of the manufacturer—

(1) it deviated in a material way from the design specifications or formula of the manufacturer or from otherwise identical units manufactured to the same specifications or formula; and

(2) the manufacturer does not establish by clear and convincing evidence that it exercised reasonable care in the product's construction.

(c) A manufacturer has been negligent in designing or formulating a product if, at the relevant point in time—

(1) the manufacturer knew or, in the exercise of reasonable care, should have known about the danger which caused the claimant's harm; and

(2) a manufacturer exercising reasonable care would not have used the design or formulation that the manufacturer used.

(d) A manufacturer has been negligent in providing warnings or instructions if, at the time the product left the control of the manufacturer, the manufacturer—

(1) knew or, in the exercise of reasonable care, should have known about a danger connected with the product that caused the claimant's harm; and

(2) failed to provide the warnings or instructions that a person exercising reasonable care would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of the harm, unless those warnings or instructions, if provided, would not have materially affected the conduct of the product user.

(e) A manufacturer has been negligent in providing post-manufacture warnings or instructions if, after the product left the control of the manufacturer, the manufacturer—

(1) knew or, in the exercise of reasonable care, should have known about the danger which caused the claimant's harm; and

(2) failed to take reasonable steps to provide post-manufacture warnings or instructions which would have been provided by a person exercising reasonable care, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of the harm.

(f) Where warnings or instructions are required under subsection (d) or (e) of this section, such warnings and instructions shall be given to the product user, unless—

(1) a person exercising reasonable care would have given such warnings or instructions to a third person, including an employer, who could be expected to take action to avoid the product user's harm or to assure that the risk of harm is explained to the product user; or

(2) the product is one which may be legally used only by or under the supervision of a using or supervising expert, in which case the manufacturer has exercised reasonable care if warnings or instructions are provided to such expert.

(g) A manufacturer is liable under this title because a product does not conform to an express warranty made by the manufacturer if—

(1) the warranty relates to the harm-causing aspect of the product;

(2) the product failed to conform to such warranty; and

(3) the failure of the product to conform to such warranty caused the claimant's harm.

(h) When the injury-causing aspect of the product was, at the time of the manufacture of the product, in compliance in all material respects with standards, conditions, or specifications established, adopted, or approved by the Congress or by an agency of the Federal Government responsible for the design, formulation, labeling or performance of the product, its manufacturer shall not be considered to have been negligent for purposes of this section unless the claimant establishes by a preponderance of the evidence that a person exercising reasonable care could and would have taken additional precautions. A determination by an agency of the Federal Government that a product is in compliance with its standards, conditions, or specifications is conclusive evidence of such compliance.

(i) It shall be a complete defense to any civil action subject to the provisions of this title that—

(1) the product at issue was acquired from the manufacturer or product seller by an agency of the Federal Government for an aerospace or defense application;

(2) the Federal Government established or approved reasonably precise contract specifications material to the claim; and

(3) the product conformed to such specifications in all respects material to the claim,

unless the claimant proves by a preponderance of the evidence that the Federal Government was not informed by the manufacturer or product seller of dangers material to the claim which were known to the manufacturer or product seller but not to the Federal Government. A determination by an agency of the Federal Government that a product conforms to its contract specifications is conclusive evidence of such conformance.

UNIFORM STANDARDS OF PRODUCT SELLER LIABILITY

SEC. 303. (a) Notwithstanding the provisions of section 301 of this title, in any civil action for injury or damage caused by a product, a product seller other than a manufacturer is liable to a claimant, only if the claimant establishes by a preponderance of the evidence that—

(1)(A) the individual product unit which allegedly caused the harm complained of was sold by the defendant, (B) the product seller failed to exercise reasonable care with respect to the product, and (C) such failure to exercise reasonable care was a proximate cause of the claimant's harm; or

(2)(A) the product seller made an express warranty, independent of any express warranty made by a manufacturer as to the same product, (B) the product failed to conform to the warranty, and (C) the failure of the product to conform to the warranty caused the claimant's harm.

(b)(1) In determining whether a product seller is subject to liability under section (a)(1) of this section, the trier of fact may consider the effect of the conduct of the seller with respect to the construction, inspection, or condition of the product, and any failure of the seller to pass on adequate warnings or instructions from the product's manufacturer about the dangers and proper use of the product.

(2) A product seller shall not be liable in a civil action subject to the provisions of this title based upon an alleged failure to provide warnings or instructions unless the claimant establishes that, when the product left the possession and control of the product seller, the product seller failed—

(A) to provide to the person to whom the product seller relinquished possession and control of the product any pamphlets, booklets, labels, inserts, or other written warnings or instructions received while the product was in the product seller's possession and control; or

(B) to make reasonable efforts to provide users with those warning and instructions which it received after the product left its possession and control.

(3) A product seller shall not be liable in a civil action subject to the provisions of this title except for breach of express warranty where there was no reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm.

(c) A product seller shall be treated as the manufacturer of a product and shall be liable for harm to the claimant caused by a product as if it were the manufacturer of the product if—

(1) the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought; or

(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

UNIFORM STANDARDS FOR OFFSET OF WORKERS' COMPENSATION BENEFITS

SEC. 304. (a) In any civil action subject to the provisions of this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, the judgment entered against each defendant and third-party defendant found liable shall be reduced by the sum of the amount paid as workers' compensation benefits for that harm and the present value of all workers' compensation benefits to which the employee is or would be entitled for the harm. The determination of workers' compensation benefits by the trier of fact in a product liability action shall have no binding effect on and shall not be used as evidence in any other proceeding.

(b) In any civil action subject to the provisions of this title in which damages are sought for harm for which the person injured is entitled to receive compensation under any State or Federal workers' compensation law, the action shall, on application of the claimant made at claimant's sole discretion, be stayed until such time as the full amount payable as workers' compensation benefits has been finally determined under such workers' compensation law.

(c) Unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product, neither the employer nor the workers' compensation insurance carrier of the employer shall have a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller if the harm is one for which a product liability action may be brought under this Act.

(d) In any civil action subject to the provisions of this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, no third-party tortfeasor may maintain any action for implied indemnity or contribution against the employer, any coemployee or the exclusive representative of the person who was injured.

(e) Nothing in this Act shall be construed to affect any provision of a State or Federal workers' compensation law which prohibits a person who is or would have been entitled to receive compensation under any such law, or any other person whose claim is or would have been derivative from such a claim, from recovering for harm caused by a product in any action other than a workers' compensation claim against a present or former employer or workers' compensation insurer of the employer, any coemployee or the exclusive representative of the person who was injured. Any action other than such a workers' compensation claim shall be prohibited, except that nothing in this Act shall be construed to affect any State or Federal workers' compensation law which permits recovery based on a claim of an intentional tort by the employer or coemployee, where the claimant's harm was caused by such an intentional tort.

(f) Without regard to when the harm giving rise to the claim occurred, the provisions of this section shall not apply to any person subject to or covered by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.).

UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES

SEC. 305. (a) Punitive damages may, if otherwise permitted by applicable law, be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by a product. A failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions or warnings is not of itself such conduct. Except as provided in subsection (e) of this section, punitive damages may not be awarded in the absence of a compensatory award.

(b) The trier of fact shall first determine whether compensatory damages are to be awarded. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. In determining whether punitive damages are to be awarded, the trier of fact shall consider—

(1) the manufacturer's or product seller's awareness of the likelihood that the serious harm at issue would arise from manufacture or sale of the product;

(2) notwithstanding the provisions of section 302(b)(2) of this title, the conduct of the manufacturer or product seller upon learning that the product caused harm; and

(3) the duration of the conduct and any concealment of it by the manufacturer or product seller.

(c) Punitive damages may not be awarded where the unsafe aspect of the product which caused the claimant's harm complies in material respects with standards, conditions, or specifications established, adopted, or approved by the Congress or by an agency of the Federal Government responsible for the safety of the design, formulation, labeling or performance of a product.

(d) If the trier of fact determines under subsection (a) of this section that punitive damages should be awarded to a claimant, the court shall determine the amount of those damages. In making that determination, the court shall consider—

(1) all relevant evidence relating to the factors set forth in subsection (b) of this section;

(2) the profitability of the conduct to the manufacturer or product seller; and

(3) the total effect of other punishment imposed upon the manufacturer or product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of other penalties to which the manufacturer or product seller has been or may be subjected.

(e) In any civil action in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages pursuant to the provisions of this title regardless of whether a claim is asserted under this section. The recovery of any such damages shall not bar a claim under this section.

UNIFORM STANDARDS OF LIMITATION AND REPOSE

SEC. 306. (a) Any civil action subject to the provisions of this title shall be barred unless the complaint is filed within two years of the time the claimant discovered or, in the exercise of reasonable care, should have discovered the harm and its cause, except that any such action of a person under legal disability may be commenced within two years after the disability ceases. If the commencement of such an action is stayed or enjoined, the running of the statute of limitations under this section shall be suspended for the period of the stay or injunction.

(b) Any civil action subject to the provisions of this title shall be barred if a product which is a capital good is alleged to have caused harm which is not a toxic harm unless the complaint is served and filed within twenty-five years of the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or using the product as a component in the manufacture of another product.

(c) Nothing in this section shall affect the right of any person who is subject to liability for harm under this Act to seek and obtain contribution or indemnity from any other person who is responsible for that harm.

APPLICATION OF OTHER LAW

SEC. 307. Except as otherwise provided in this Act, nothing in this title shall be construed to affect any statutory or common law rule governing recovery by a claimant, or any statutory or common law rule governing the effect of the comparative responsibility of the claimant upon the recovery.

TITLE IV

RISK RETENTION

SEC. 401. Section 2(a)(3) of the Product Liability Risk Retention Act of 1981 (15 U.S.C. 3901(a)(3)) is amended by inserting "including liability for payments under title II of the Product Liability Voluntary Claims and Uniform Standards Act," immediately after "a product,".

Senator **Kasten**. Our first panel, if they would come forward, Mr. O'Connell, Mr. Carone, Mr. Shapo, Ms. Hensler, Ms. Chalfie, and Mr. Huber.

As I think everyone can recognize with a standing-room-only crowd and with witnesses jammed at the table, we have a busy and hectic morning. We are going to use the system of lights. Witnesses have been advised that they should summarize their views. Their testimony will be limited to 5 minutes. Their entire testimony will appear in the record as long as they only summarize it, and that will give us time to work our way through questions but also, more importantly, time to work our way through the entire schedule of witnesses that we have. So we will go forward.

The first witness is Mr. Richard Carone with Rexworks, Milwaukee, WI, representing the Independent Business Association of Wisconsin and Small Business United.

We are particularly happy to have you here from Wisconsin and representing small business in Wisconsin.

Mr. Carone.

STATEMENTS OF RICHARD CARONE, REXWORKS, INC., REPRESENTING THE INDEPENDENT BUSINESS ASSOCIATION OF WISCONSIN AND SMALL BUSINESS UNITED; MARSHALL S. SHAPO, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW; JEFFREY O'CONNELL, PROFESSOR, SCHOOL OF LAW, UNIVERSITY OF VIRGINIA, ACCOMPANIED BY KEITH DAVIDSON, CHAIRMAN-ELECT, AMERICAN BAR ASSOCIATION, SECTION OF TORT AND INSURANCE PRACTICE; DEBORAH R. HENSLER, RAND CORPORATION, INSTITUTE FOR CIVIL JUSTICE; DEBORAH M. CHALFIE, LEGISLATIVE DIRECTOR, HALT, INC.; AND PETER W. HUBER

Mr. **Carone**. Thank you, Senator Kasten and members of the subcommittee. I appreciate this opportunity to testify before you today.

Because my remarks are short, I would like to read the testimony that I have submitted.

My name is Richard Carone, and I am vice president of Rexworks. We are located at 445 West Oklahoma Avenue, Milwaukee, WI. I am testifying today on behalf of the Independent Business Association of Wisconsin, a 2,000-member association of small and medium-sized Wisconsin firms. IDA is a member of Small Business United, a national legislator coalition formed to improve the Federal policy climate for small business.

Rexworks manufactures construction equipment which may have a product life of over 30 years. To give you an example of our products, we manufacture truck-mounted concrete mixers, concrete plants, vibratory rollers, and asphalt and concrete road paving equipment.

In 1982 nine senior managers, including myself, purchased Rexworks as a leveraged buyout. Among the many things that we did with this company was to elect to distribute 25 percent of our company's stock to the employees over a 5-year period. The reason that I include this is to demonstrate that all of our employees are also stockholders of our corporation.

We began with a company that was in the red and 284 employees. Today we have 480 employees and modest positive net worth.

I am testifying here today concerning my difficulties with obtaining product liability insurance. As an example, in 1982 our insurance premiums were $82,000 for $500,000 of coverage, with an umbrella of $10 million. In 1985 the best product liability proposal we could obtain was for a premium of $541,000. We would get $500,000 of coverage with a $15,500,000 umbrella and that was providing that Rexworks assumed the first $1 million of loss.

As negotiations progressed with the various insurance companies, the lead insurance company increased the premium and reduced the coverage. After carefully evaluating all of the options, the board of directors decided it was not prudent to purchase product liability insurance, since it would have exceeded our 1985 pretax income.

Today Rexworks is self-insured and we have organized ourselves and our legal counsel to mount a vigorous defense. One of the disturbing trends that we noticed in the years before we came self-insured was the fact that our insurance carriers were inclined to settle, even in cases where clearly Rexworks was not at fault.

The logic of the insurance companies was that it was better to settle than to risk a jury trial where the outcome is unpredictable. Because a major unfavorable settlement could wipe out Rexworth's net worth, our company and our employees' jobs are constantly at risk.

As the strategic planner of Rexworks, I view this as the major threat to our corporation in the foreseeable future. It is also my perception that the public seems to view product liability cases as a multimillion dollar lottery opportunity. This attitude is actively encouraged by the notoriety that major awards have been settled that really have no basis of reality.

Manufacturers also have increased liability exposure because the claimant's employer who frequently has a major responsibility for the injury is protected from employee suits by the Workmen's Compensation statutes.

As a small Wisconsin business, Rexworks or any other business cannot function in a climate of uncertainty and increasing judgment awards motivated by the contingent fee system. In addition, there is a lack of uniformity among various States in the product liability area. These are major factors in increasingly high premiums and unavailability of adequate coverage.

It is important that Congress expediently enact laws which will create a more stable and uniform product liability system so that small businesses can survive and plan for the future.

Senator, thank you for this opportunity to testify before the subcommittee. I would be happy to entertain any questions.

Senator KASTEN. Thank you very much for your testimony.

The next witness is Professor Marshal Shapo, Vose Professor of Law at Northwestern University.

Professor Shapo.

Mr. DAVIDSON. Mr. Chairman, if I might be permitted, Mr. Shapo is appearing on behalf of the American Bar Association and I would like to introduce Mr. Shapo—My name is Keith Davidson—

and state the position of the American Bar Association very, very briefly.

As I indicated, Mr. Shapo will be our chief witness today. I am appearing at the request of William Falsgraf, President of the American Bar Association, simply to tell the committee that we very much appreciate the opportunity to appear before you and that we adhere to our position previously submitted to this committee over the years.

I can very succinctly state that we oppose broadly-based Federal legislation in the area of product liability, but continue to support Federal legislation in the area of occupational disease under certain conditions, if they may be shown to exist, and which we have spelled out in our submissions and those include a long period of latency between the time of exposure and manifestation of the disease; the demonstration that the number of claims and liability for damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and that the number of such claims have become clearly excessive burdens upon the State and Federal and judicial system.

After that, I would only say to you that we are taking a very strong and careful look at the situation with many, many programs underway. We hope to have answers where they are needed.

Thank you.

[The statement follows:]

STATEMENT OF KEITH L. DAVIDSON, CHAIRMAN-ELECT SECTION OF TORT AND INSURANCE PRACTICE ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: My name is Keith Davidson. I am appearing for the American Bar Association at the request of the ABA President, William Palsgraf, by virtue of my being Chairman-Elect of the ABA Section of Tort and Insurance Practice. With me is Marshall Shapo, Professor of Law at Northwestern University Law School in Chicago, and reporter for a five-year study at the ABA on the American tort liability system. This study was prepared by the Special Committee on the Tort Liability System. That ABA committee was chaired by former U.S. Attorney General Griffin Bell. The report is entitled "Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law." The views represented in that report are not ABA policy as our House of Delegates has not been asked to act on this document.

Mr. Shapo is the ABA's main witness today. I am here mainly to introduce him but also to make some brief comments. First, appended to my statement are the policy positions of the Association on this issue. Because these policies have been discussed in detail by other ABA witnesses at prior hearings, I want only to tell you that, for the reasons stated in the prior documents, the ABA remains opposed to broad federal legislation preempting state law on products liability such as the staff working draft. However, we continue to support narrowly drawn federal legislation on victim compensation which addresses the issues of liability and damages with respect to claims arising out of occupational diseases (such as asbestosis) with long latency periods, in cases where the number of such claims and the liability for such damages threaten the solvency of a significant number of manufacturers engaged in interstate commerce, and the number of such claims have been excessive burdens on the judicial system. The ABA government's special relationship with its contractors.

Broad federal legislation would seriously impair the rights of American consumers by depriving them of the sound guidance of the well-developed product liability laws of their individual states, as well as the flexibility to carefully refine the law through their state courts, and to make any necessary major improvements in the law through their state legislatures in furthermore of their economic or social needs.

Second, I would like to comment on some activities of the ABA relevant to tort liability. Subsequent to the Bell Committee's five-year study, the ABA has continued and will continue to study problems in the tort liability system with an eye toward making recommendations on how it can be improved. Publication of the report was followed by an ABA-sponsored conference on the tort liability system in Lexington, Kentucky. The conference, held to discuss where tort law is and should be heading, involved 120 lawyers, trial and appellate judges and academic leaders representing the full range of views on tort law improvement. The conference left no doubt that the debate over tort law improvement includes an immense array of substantive, procedural and ethical issues that cannot be addressed in a manner that is both sweeping and just. As Justice Cardozo said, the common law has developed slowly but with the force of a glacier. The ABA is answering calls to stop or redirect it with courage but with appropriate regard for the wisdom and stability of tort law.

Near the end of 1985, our ABA President Falsgraf appointed an Action Commission to Improve the Tort Liability System which expects to make policy recommendations to our House of Delegates in February, 1987. The Commission, composed of some of the most distinguished lawyers, law professors and federal and state judges, will study the recommendations in Chapter 13 of the Bell Committee report as well as other studies of the tort liability system.

I thank the Chairman and the Subcommittee for permitting me to appear before you today.

Mr. DAVIDSON. And if I may introduce Mr. Shapo.

Senator KASTEN. Professor Shapo, you might want to grab the microphone.

Professor Shapo.

Mr. SHAPO. Mr. Chairman, as always it is a great privilege to be here. I am Marshall S. Shapo and I am a professor at Northwestern University School of Law. I am here under the formal sponsorship of the ABA, but my testimony represents my own views. You have my prepared statement.

The first point I am going to make here is that since the basic body of product liability law in place today has existed for at least a decade, it seems curious that only now we should be in the midst of a crisis. And I think that one is entitled to ask what the things are that are external to the written law that are causing this perceived problem.

Like you, I hear and read some outlandish stories, but I really have not seen the data that shows that substantial numbers of judgments have imposed costs on product sellers that are not economically justified or are not fair.

I want to emphasize one specific point about this complex draft. I suspect that strict liability, which is a casualty of title III, has redressed an otherwise unbalanced situation in cases where seller negligence previously went unlitigated and unregulated.

As it stands, the draft presents several paradoxes. In the name of cutting down on litigation, it will present a novel set of legal problems that will burden the courts for years to come. In the name of aiding injury victims, it sets up a complex system that, arguably, makes justice more inaccessible than it is today. In the name of inspiring confidence in the law, it implies the most destructive criticisms of the principal guardians of our private law, the State courts.

I would suggest that the best legislation this Congress could enact on the subject of products liability would be a modified version of sections 111 and 213 of the working draft, a version that would set up an agency to gather the facts on the actual operation of the present legal system, including its insurance components.

I do think that the composition of this panel shows that the committee is asking the right questions. The issue is what answers should be given? I have read the writings of three members of this panel and with respect I venture these observations.

At least to one whose study of torts occasionally ventures into regulation, Mr. Huber's recent sanctification of regulatory agencies tends to ignore various realities of regulation, administrative process, and above all, politics.

Professor O'Connell and I have long differed on these issues. I believe that the formulas he uses to solve tort problems miss a good deal of the point of tort law.

The work of Ms. Hensler and her colleagues is particularly interesting. With respect to the present argument, its limitation to asbestos or at least to mass toxic torts proves both too little and too much. On the one hand, it is carefully limited to the narrow fragment of cases which the team did its research on.

On the other hand, the constant characterization of the asbestos situation as a case of mass toxic *torts* demonstrates that what we are talking about often is seriously culpable conduct.

While there is something of a consensus that cases of this sort may merit special procedural treatment, I would be very reluctant to give up the messages that our presently developed tort doctrine sends to enterprises, consumers and citizens alike.

Two concluding points. First, I want to underline that if Congress takes a bite out of the products liability apple, it is inevitably going to have to deal with a whole orchard of insurance.

Finally, it is hard to know how this bill would operate in practice. It is even possible that title II would seriously disadvantage manufacturers by making them virtual social insurers. More likely, the combination of title II and title III would seriously affect the ability of the private law to provide information about product hazards. As the Challenger inquiry exerts its dread fascination on all of us, it can hardly escape a lawyer's attention that there are some relevant prima facie tort questions there. It is worth remarking that the system of tort litigation, for all its faults, has enabled individual lawyers and individual judges, with fair success, to do a fact-gathering job very similar to that which is now occupying a substantial amount of the time of a blue ribbon commission of a dozen people carrying a Presidential warrant.

That system has provided a method that may be better than one of our premier scientific agencies for controlling—this is Mr. Huber's phrase—the "creatures of science and engineering." I doubt very much that this proposal would prove superior.

Thank you very much.

[The statement follows:]

STATEMENT OF MARSHALL S. SHAPO, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. Chairman, it is a great privilege to be here. I am Marshall S. Shapo, and I am a professor at Northwestern University School of Law. I am here under the formal sponsorship of the American Bar Association. I served as Reporter for the A.B.A.'s Special Committee on the Tort Liability System from 1980 through 1984. The written product of that Committee appears in the book, *Towards a Jurisprudence of Injury*. That book surveys the tort system generally and analyzes its relationship to many other parts of our law relating to injuries. I have asked A.B.A. staff to attach relevant parts of Chapter II of that report to this statement. The first several pages of that chapter present an overview of tort law. A later subchapter of Chapter II deals particularly with products liability, and includes specific references to actions by the A.B.A.'s House of Delegates on this subject. Also appended is Chapter 13 of the Report, which includes a lengthy list of recommendations and suggestions for improvement of the tort system. I understand that the A.B.A's Action Commission will be considering these recommendations, which have not at this time been submitted to the House of Delegates.

My testimony here today represents my own views, drawn from my study of tort law generally and products liability law in particular.

The working draft I have read calls for extraordinary legislation: the replacement of a substantial body of state law, painfully wrought over a period of a quarter century and more, by a general federal statute. To justify this sort of statute requires powerfully persuasive arguments. I do not think that the proponents of this bill have carried their burden. I would like to indicate why, bringing legal theory down to straightforward terms.

First, I address myself to the question of need. I am aware that the members of the Committee hear a great deal from individual product sellers, and their trade groups, about the problems that they believe products liability law is causing them. From what I read, and what I hear, the focal point of this concern is the impact of increased products liability insurance premiums. This leads to some issues of history and of economics, and some very important questions of fact.

Since the basic body of products liability law in place today hsa existed for at least a decade, it seems curious that only now should we be in the midst of a crisis. One is entitled to ask whether this "crisis" is simply one in a series of periodic adjustment that have taken place in insurance rates. And if the situation really is an emergent one, one is entitled to ask, why now? Since the law has been pretty much the same for several years, why is there such concern to change the law?

I have heard no satisfactory answers to this question. And I am led to wonder whether there are some things external to the written law that are causing this perceived problem. Obviously, one possibility lies in the practical workings of the legal process, including the way that juries operate. Yet the empirical evidence that I have read does not suggest that there have been dramatic changes in that regard; surely not changes earthshaking enough to have caused a crisis. Another possibility that presents itself has to do with the way that the insurance system operates. I am not sure how much knowledge the Committee has gathered about relevant insurance factors. I do note that in the principal federal study of products liability to date, the Interagency Task Force on Products Liability concluded that one of three principal "probable causes of product liability problems" was "liability insurance rate making procedures."

I surely do not deny that in the sense that a person knows he is uncomfortable about something, there is a perceived problem. I suggest, however, that it is far from clear what that problem really is. And it certainly is not at all clear that the solution is to change the substantive law of products liability, especially through a comprehensive statute. I should emphasize that opposition to comprehensive federal legislation does not preclude support for certain kinds of specific legislation directed at particularized problems. In that regard, it is worth mentioning that the A.B.A House of Delegates has expressed its support for "federal legislation which addresses the issues of liability and damages" for occupational diseases with long latency periods, when "the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce," and "the number of such claims have become clearly excessive burdens" on the judiciary.

There are at least three groups of persons who have substantial stakes in the resolution of these questions: Those who have been injured by encounters with products, the sellers of products, and the consuming public generally. The law in this area has evolved because of a perception that the protection afforded by legal rules to injury victims was inadequate. The doctrine of strict liability, in particular, developed because of the perceived difficulties of proving worthy cases under the traditional negligence rules. I suggest that the principal effect of this newly developed tort doctrine has been the practical enablement of suits by injury victims in situations where it was difficult in practice for negligence doctrine to do the job of uncovering negligence. There are no statistics that I know of to prove or disprove the point, but I suspect that strict liability has redressed an otherwise unbalanced situation in cases where seller negligence previously went unlitigated and unregulated. I make the point about lack of regulation because a principal value of tort law is to provide a gyroscopic mechansim as the regulatory pendulum swings back and forth.

This brings me to a point which I believe has been obscured by much of the cannon smoke that hangs over this battlefield. It is that the legal developments which have given rise to this controversy have come out of a slow, careful judicial process extending across the fifty states. Even the most controversial decisions imposing liability on sellers have required the concurrence of a trial judge, usually a jury and always a majority of at least one state or federal appellate court. To take one legal rule in particular, the doctrine of strict liability has been adopted for products cases in almost every state after much argument and thoughtful consideration. On one of the prior occasions when I had the honor of giving testimony to this Committee, a member of a Congressional staff remarked to me, "They don't like you coming up here and telling them that the courts can do the job better than they can." But I think that that casts the issue in an unnecessary argumentative way. As one who has carefully observed the seriousness with which judges struggle with the questions of both fact and law that arise in products liability cases, I think the point is that there is a very strong presumption in favor of that process where injury litigation is concerned. That presumption exists, in part, because of the relative flexibility and capacity for adjustment of the judicial process in resolving questions of both fact and law. It exists also because of the advantage of decentralized decision making through state law.

Now I turn back to the question of who wants general federal legislation. I do not have the sense that there is an army of injury victims who are claiming that the law has treated them unjustly, although that is not to say that all of them have been compensated through the litigation process. Moreover, from what I have observed, the major consumer organizations have not tended to be supporters of this sort of legislation, despite the theoretical economic arguments that have been made that the present state of the law actually is disadvantageous to consumers.

Thus, the principal advocates of legislation of this sort are product manufacturers and sellers. And that gets us back to the problem of data. Where are the statistics that tell us that these firms have been treated unjustly *by the law?* Where are the data that tell us that substantial numbers of judgments against product sellers have imposed costs that are not economically justified, or are not fair? If those statistics exist, they would cast doubt on the capacity of our courts to do justice in this arena.

But I have not seen that data. And therefore I have to think that maybe, on the whole, the contribution of the law has been to provide a fairly accurate picture of the true social cost of products accidents. I do not know that to be the case, but I have not really heard what the case is against it.

I have heard, as you have heard, that insurance costs are burdensome. But I do not know if that is because there is a lot of injustice out there, or because a lot of justice *is* being done in the courts, or because there are some serious kinks in the insurance mechanism, or for some other reason. I am not suggesting that I know the answer. I am only saying that it is a very big question, and that before this great body enacts a federal law on the subject, that question deserves a better answer than I have heard in prior hearings.

I think it is very telling, in that connection, that the working draft sets up at least two ongoing review bodies to collect exactly the sort of information that one would really want Congress to have before it enacted legislation this broad and far reaching. This is so with respect to the Products Liability Review Panel, which is directed to make inquiries about the effects of the proposed legislation that would much better be made before the enactment of any legislation. And it is also the case with the Health Effects Panel. Indeed, I would suggest that the best legislation this Congress could enact on the subject of products liability—and the only legislation that is truly called for in the present situation—would be a modified version of sections 111 and 213 of the Working Draft. This version would set up an agency to gather the facts on the actual operation of the present legal system, including its insurance components.

While I am not an expert in questions of federal jurisdiction and judicial review, my general legal training leads me to observe that the enactment of this kind of law necessarily will place even more burdens on the judicial system than it now carries. If the legislation is really taken as writing on a clean slate, the result will be many years of trench warfare litigation to straighten out the meaning of the statute without very precise guidance in the legislative history. The more sensible alternative, I expect, would be for the courts to draw heavily on the law as it now exists. The results then would be to add an extra tier of decisionmaking, and to introduce further uncertainty and confusion into a body of law which has been condemned as uncertain but has really been working itself out in a rational common law way. Even though I cannot forecast exactly what would happen, I think that the enactment of this sort of law against the background of the history that already exists will be to create a theoretical morass and a practical mess.

I have suggested that a large part of the perceived problem is that the problem itself has not been properly identified and described. I don't claim that I fully understand it myself. But from what I can see, the Committee should be aware of one thing in particular, something that relates to the increasingly frequent references to the "liability insurance crisis": If Congress takes a bite out of the products liability apple, it is inevitably going to have to deal with the whole orchard of insurance.

There is one thing I have said before in this forum that I will repeat: Congress has a full plate of international problems and broad questions of economic equity with which only Congress can deal. In a day when we are told that the role of the federal government needs curtailment, it would be a sad mistake to federalize a body of law that for all its faults must be said to be in good hands: the hands of those who interpret state law. The probable effects of such legislation would be confusion, complexity and uncertainty.

Senator KASTEN. Thank you. The next witness is professor O'Connell, professor of law at the University of Virginia. We note that you are scheduled to appear in two different panels. We are aware of this because of the scheduling. It does not mean that you have got 10 minutes on this panel, but if it is necessary for you to stretch for 1 minute or something like that we are hopeful that you can make your summary comments, and your prepared remarks will appear in the record as if read.

Mr. O'CONNELL. Thank you very much, Senator. Marshall Shapo and I do differ fundamentally here. I think the fundamental problems of the tort system can be summed up in two variables which do not exist in any other form of insurance, and which explain why product liability insurance is such an unmitigated disaster in providing not signals but absolutely wildly distorted indications of what is going on in our economy, as Professor Huber I think has very ably demonstrated in some of his writings.

If you are badly injured in our society by a product and you go to the highly skilled lawyer like Mr. Davidson, who is one of the best, in all honesty Mr. Davidson cannot tell you what you will be paid, when you will be paid, or indeed if you will be paid.

Now, if there is one thing that insurance ought to supply to us, it is certainty after misfortune and that is the one thing that product liability cannot do. It cannot do it because it makes payment turn on fault as either a defect in the product or negligence on someone's part.

You will note that no other form of insurance is payable based on fault. Life insurance is not payable on fault. Fire insurance is not payable on fault. No other form of insurance awaits payment for years and years and years of highly expensive maneuvering by Mr. Davidson and his opposite to find out what the hell happened.

When they do find out what happened, what do they do? They give it to a jury, and a jury question, as any lawyer knows, is a question that can be decided either way and be right, so what do you learn from a jury verdict? That either side could have won and been upheld. Some signal.

The second difficulty is that tort law pays for pain and suffering in individualized amounts. No other form of insurance tries to do that. Life insurance doesn't pay you for your grief when your wife dies. It pays you the face amount of the policy no matter how much you loved her or hated her.

So for life insurance, we do not litigate how much you loved your wife. We do in tort. You come in and parade your grief for your wife, and the jury listens and violins are played by Mr. Davidson and his colleagues to prove how much grief there was. How certain is that? We do not pay for pain when a woman gives birth, although God knows having watched my wife give birth I cannot imagine anybody going through much more pain than that.

We pay the medical bills, and we do not try to gauge how much grief or pain people suffer when we pay them health insurance or when we pay them disability insurance. When your house burns down you cannot come in and say my grandfather built that house: It means more to me than any house in the world. We say the face amount of the policy is what you paid, and the fact that you suffer grief over the loss of an heirloom is not compensable.

I suggest to you there is a reason why no other form of insurance tries to pay based on fault and for pain and suffering; because every other form of insurance knows that it will not work, that it is a disaster. It is only when we lawmakers take over and define the insured event foolishly, wastefully, except for lawyers, that we try to pay based on fault and pay for pain and suffering.

When I was here last time Senator Gorton asked me if I would provide him with some criteria for reform, and I have been remiss in not doing that, trying to crisply state what I think ought to be your aim. I have tried to set it forth, and let me do so.

I think the criteria for tort reform are these: We ought to make it easier, to the maximum extent feasible, for injured people to be paid promptly for their economic loss, net economic loss beyond their own insurance, without litigating their own or others 'fault and without significantly increasing uncertainty which surrounds accidents, including not raising current liability costs.

Now, you can argue that current liability costs ought not to be sacrosanct, but I suggest if this committee tries to write a blank check and say we are going to improve product liability insurance at an unknown cost that is not serving society in its present stance very well.

I do not see why we should be cutting Medicare and cutting Medicaid, with a lot of people unemployed and without health insurance, and all of a sudden greatly expand this form of insurance which is one of our worst forms of insurance. That strikes me as an anomaly in the extreme.

We ought to be paying, as I said, to the maximum extent feasible, injured people, without their having to prove their own lack of fault or others' fault. We can increase certainty, and we can hold the line on, and maybe even lower, costs by paying for any increase in new claims from making it easier to be paid, by lowering litigation expenses, and by lower payments for noneconomic loss.

I appreciate that is a big mouthful, but I suggest if you run the reforms that have been proposed on both the right and the left, to use those terms loosely, you will see that they all fail.

They fail, for example, as I think Senator Danforth rightly pointed out, and he was one of the first public figures to point it out in trenchant terms, that the way to solve the tort problem is not to make it harder for people to get paid, which is what all the reforms in S. 44 and S. 100 did. As much sense as a lot of those reforms made, they made each one of them made it harder for people, who already found it very hard to be paid, to be paid. That is not good reform in my view.

Second, if I can say it, this bill, while God knows it is struggling to do the right thing, opens up the other end. It opens up new claim frequency of an absolutely unknowable amount. No one can predict, based on the language of this bill, how many new claims there are going to be and how much payment is going to be called for.

I suggest to you if you read the bills triggering event under title II, with all due respect for Mr. Zorensky, the principal staff draftsman, who I think is a superb person, it reads as though it were written by James Joyce.

We are going to spend decades finding out what Zorensky meant as well as what Joyce meant.

Let me just offer very briefly my thoughts as to what you ought to do here. I think you have to keep your ideas simple.

I've drafted a lot of compensation bills. I think I have drafted more compensation bills than anybody in North America. You have to keep it simple. If you get a very elegant structure like this with unknown terms and new terms or old terms newly defined, you are going to create a nightmare.

I suggest to you that the bill ought to say if a defendant will tender within say, 180 days, or within 90 days, the net economic loss of the plaintiff, then the plaintiff cannot sue unless the defendant behaved criminally; that is, with intent to injure, which is a very bizarre case. That way you do not force anybody to pay under circumstances he is not paying now, so you control new claim frequency but you put a great incentives on a defendant to pay the plaintiff promptly for his real loss.

I suggest, given the cost of hiring Mr. Davidson who comes very high—and he ought to, he's very good—given how much it costs to pay him and his counterpart on the other side, if you can come forward promptly and pay for net economic loss without paying, for lawyers and for pain and suffering, a lot of defendants in a lot of cases are going to do that, and consumers are going to benefit.

That may strike people as unfair in the sense that it gives all the power to the defendant. The great problem, I think, with this bill is that it tries to give both parties the right to behave strategically, and I think that is going to create so much chaos that we cannot live with that.

What I would suggest is this. As a triggering event, not trying to redefine fault, not trying to redefine defect, not trying to redefine causation, because all the people up there and all the people down here, as smart as we are, we are not going to be able to do that. We are not going to be able to do it.

What we should do is this. We should—I offer this as a suggestion as a triggering event—say that if a defendant does not tender net economic loss, at the least he has to offer anybody who has made a claim a prompt arbitration hearing on the right to get that net economic loss based on fault, based either on product defect or negligence. That is a matter of detail. I do not think it makes much difference which.

I think you delude yourself, if I can speak once again candidly, in thinking that there is a great difference between defining defect and defining fault because I would urge you to think about medical malpractice. There is no strict liability for doctors in medical malpractice, and yet they are facing exactly the same crises that manufacturers face.

What I would do is keep it simple. I would give the defendant the right, when he finds it in his interest, to come forward and pay the claimant's real loss promptly because that is almost always going to be in the claimant's interest as well. I would say if he does not do it, at the least he has got to offer the claimant the right to a prompt hearing on the claimant's right to net economic loss, based on fault, if the claimant wants it.

If the claimant does not want a prompt hearing and wants full-scale litigation, that is fine, but the defendant ought to be required to offer every injured party who makes a claim either a prompt hearing or prompt payment. It seems to me that would be a vast improvement, relatively simple, and it would improve on the mess we laywers have made of insurance payments for product injury.

Thank you.

Senator **Kasten**. Thank you very much, Mr. O'Connell.

The next witness is Deborah Hensler of the Rand Corporation, Institute for Civil Justice.

Ms. Hensler.

Ms. **Hensler**. Mr. Chairman, members of the subcommittee, thank you.

I am a senior social scientist on the staff of the Institute for Civil Justice at the Rand Corp. The Institute conducts policy analysis research on civil justice system issues. Its research is supported primarily by corporate and foundation grants.

The purpose of my testimony today is to share with you the results of our empirical research that are most relevant to consideration of the product liability system. In the few minutes I have this morning I am just going to touch briefly on a few of the topics I have covered in more detail in my written testimony.

First, a major issue for debate in this area as is made obvious by the discussion which has already taken place this morning is: What has actually been transpiring regarding verdicts? Have there been major changes or not? The ICJ has assembled a statistical data base that tracks the results of all civil jury trials in two major metropolitan trial court jurisdictions in the county, Cook County, IL and San Francisco, CA, over the past 25 years. Let me tell you some of the results of those analyses.

In both jurisdictions the typical jury award for personal injury cases has remained remarkably stable once the effects of inflation have been accounted for, over this inline period. The typical case involves only a slight injury, and the typical plaintiff receives only a modest amount from the jury.

However, despite this overall pattern of stability there have been sharp changes in jury awards for certain kinds of cases. The typical award for seriously injured plaintiffs doubled or tripled (after accounting for inflation) during the 1970s, and the typical wrongful death award doubled, in both jurisdictions.

Further, juries in both jurisdictions increased awards in certain types of lawsuits, including product defect lawsuits, regardless of the seriousness of the injuries involved. The tendency to treat plaintiffs in these kinds of lawsuits more favorably than plaintiffs who had similar injuries but other causes of action increased during the 1970's—that is, there was an increased premium for having a product defect case or medical malpractice case.

The amount of money litigants could expect to win or pay out also depended on their own characteristics. In both jurisdictions when sued in the same type of lawsuits by plaintiffs with comparable injuries, businesses paid one and one-half times the amount paid by individual defendants. Corporate defendants were also more likely to be found liable than individual defendants. This provides some statistical evidence for the oft-noted "deep pocket" effect.

There has been a growing number of exceptionally high awards. The increased frequency of these very high awards drove up the statistical average for jury awards generally.

Finally, some of the largest awards could not be explained by the statistical measures that we constructed to measure severity of injury, disability, et cetera. The number of these inexplicably high awards increased during the 1970s. This finding also provides statistical support for the often expressed notion that jury awards are increasingly unpredictable.

Trends regarding punitive damage awards have generally been similar. The typical award has been small throughout this period, but it has increased in size and the number of such awards has increased substantially in both jurisdictions.

Let me turn now briefly to the issue of corporate responses to product liability litigation and our research regarding that question. In 1982 we conducted a study that involved interviews with corporate product safety officials in nine large firms that are generally regarded as leaders in the safety field.

The researchers drew the following conclusions: First, except for firms that were subject to highly intrusive regulation, the most significant influence on product safety efforts was the product liability system.

Second, product liability conveyed an indistinct signal from manufacturers because of the long lag between the design decision and the final judgment on product liability claims, the inconsistent behavior of juries, and rapid changes in judicial doctrine.

Third, firms 'response to product safety pressures varied considerably, depending not only on the inherent seriousness of the safety problems they faced but also on the underlying organization of the firm and the philosophy and management style of the CEO. In some firms the response to product liability was primarily legalistic and defensive. In others, however, it was more operational and it emphasized hazard reduction.

Finally, let me turn to the special problems posed by mass toxic torts, many of which this bill attempts to address. Over the past few years, as has already been noted, we have conducted a series of studies on asbestos personal injury litigation that highlight these problems.

We found asbestos cases do pose a significant problem for the courts around the country in which they are concentrated. Most of these courts have had serious problems disposing of cases. In a few jurisdictions with large asbestor caseloads, few cases have been disposed of although the cases have been pending for many years. In other jurisdictions, at the current rate of disposition courts will not have disposed of their current caseloads, much less new asbestos cases, until well into the next century. Most plaintiffs must wait a minimum of 3 years and as long as 5 or more years until their cases are resolved.

Based on our research, we believe that the problems that are posed by asbestos cases; long times to disposition, and high transaction costs to dispose of these cases, are a direct result of the lack of fit between the characteristics of the cases (which are also shared with other mass toxic tort claims) and the substantive and procedural rules that now govern the civil justice system.

[The statement follows:]

STATEMENT OF DEBORAH R. HENSLER, THE INSTITUTE FOR CIVIL JUSTICE, RAND CORP.

RESEARCH RESULTS REGARDING THE TORT LIABILITY SYSTEM

Mr. Chairman and Members of the Commerce Committee. My name is Deborah Hensler; I am a senior social scientist on the staff of the Institute for Civil Justice (ICJ) at the Rand Corporation. Rand is a private non-profit corporation that conducts public policy reseach. The Institute was established at Rand in 1979 to conduct policy analytic research on the civil justice system. Its research is supported primarily by corporate and foundation grants.

The purpose of my testimony today is to share with you the results of our research that are most relevant to a consideration of the product liability system. My testimony will touch on five topics, each of which has been the subject of empirical research at the ICJ.

1. Trends in civil jury verdicts, particularly as they relate to product liability lawsuits;
2. Effects of product liability lawsuits on corporate behavior;
3. Public expenditures to process tort liability suits;
4. Special problems posed by mass toxic lawsuits; and
5. The use of alternative dispute resolution procedures for resolving tort cases.

TRENDS IN CIVIL JURY VERDICTS

Over the apst half dozen years, the ICJ has asembled a statistical data base that tracks the results of all civil jury trials held in Cook County, Illinois and San Francisco, California from 1960 to 1979.[1] Analyses of these data show that: [2]

1. In both jurisdictions, the typical (median) jury award for personal injury cases is modest in amount; the typical compensation for most injuries in recent years was less than $20,000.[3] Moreover, the amount awarded for the typical case, which involves only slight bodily injury, remained roughly the same over the entire twenty year period, after the effects of inflation were taken into account.

2. Despite the overall pattern of stability, there have been sharp changes in jury awards for certain kinds of cases. The typical award for *seriously* injured plaintiffs—those who lost a limb, suffered paralysis or burns or serious eye or ear injuries—doubled or tripled, and the typical wrongful death award doubled, in both jurisdictions, during the 1970's.

3. Further, juries in both jurisdictions increased awards in certain types of lawsuits, specifically medical malpractice, defective products and street hazard cases,

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[1] The ICJ has recently updated the data base to include verdicts through 1984, and other jurisdictions in california. However, unless otherwise noted, the results cited here apply only to Cook County and San Francisco and only for the period through 1979.

[2] The findings reported here are drawn from Peterson, 1985; Chin and Peterson, 1985; Peterson and Shanley, forthcoming; and Chin and Peterson, forthcoming.

[3] Unless otherwise noted, all amounts are in 1979 dollars.

regardless of the seriousness of the injuries. San Francisco juries doubled the amount of money awarded to plaintiffs in these lawsuits, compared to what plaintiffs received for similar cases in the 1960s; Cook County juries showed the same general pattern of change but the rate of change was somewhat less. The tendency to treat plaintiffs in medical malpractice, product liability and street hazard cases more favorably than plaintiffs who had similar injuries but other causes of action increased during the 1970s. In Cook County, in the 1970s, a plaintiff who was injured due to medical malpractice was awarded an amount that was 3½ times the amount awarded to a plaintiff for a similar injury due to an accident on property; in San Francisco a plaintiff in a product liability case received twice the amount as a plaintiff with a similar injury from an accident on property.

4. The changes in the amount of money awarded for serious injuries and the amount of money awarded for medical malpractice, product liability and street hazard cases contributed to a growing number of exceptionally high awards. The increased frequency of these very high awards drove up the statistical average for jury awards. For example, the average (mean) award to plaintiffs who lost a limb increased three-fold in San Francisco (from $321,000 in the 1960s to $1.1 million) in the 1970s. In Cook County the average wrongful death award increased from $125,000 to $385,000.

5. The amount of money litigants could expect to win or pay out depended not only on the injuries involved and the cause of action but also on their own characteristics. In both jurisdictions, when sued in the same type of lawsuits, by plaintiffs with comparable injuries, businesses paid 1½ times the amount paid by individual defendants. In Cook County, when the plaintiffs sustained serious injuries, corporate defendants on average could expect to pay 2½ times the amounts paid by individual defendants. Corporate defendants were also more likely to be found liable than individual defendants. Jury awards also appeared to be sensitive to the race of the litigant. In Cook County, during the 1970's, blacks lost their civil suits more frequently than whites; when they were successful, black plaintiffs received less than white plaintiffs with otherwise similar characteristics. (The analysis of the effect of race on awards could not be duplicated for San Francisco, because parties' race is not recorded in that database.)

6. Some of the largest awards could not be explained by the statistical measures researchers constructed to reflect severity of injury, disability, special damages, or cause of action. The number of those unexplicably high awards increased during the 1970s.

7. The number and size of punitive awards also increased substantially in both jurisdictions during the past twenty-five years. In Cook County, the rate of increase rose sharply during the 1980's: the number of punitive damage awards doubled and the total amount of money awarded increased by 700 percent during this period.

8. Although punitive damage awards were volatile, the typical award remained small through most of the period and the total number of such awards in both jurisdictions was less than 200. And most punitive damage awards were made in cases involving intentional torts, rather than ordinary personal injury cases. Punitive damages were awarded in only eight product liability suits in both jurisdictions over the entire 25-year period. But in the past few years there has been rapid growth in the number and size of punitive awards in personal injury cases, including product liability cases, in Cook County.

9. Punitive damage awards against businesses increased both in number and amount in both jurisdictions, and the rate of increase was particularly great in recent years. Both compensatory and punitive damage awards against business defendants were larger than awards against individual defendants. And, during the 1980's, juries seem to have increased the amount of punitive awards relative to plaintiffs' losses, with regard to business defendants.

10. A substantial number of punitive damage awards are reduced after trial, as a result of settlement or judicial action. For the period studied, across all closed cases, including those in which the original judgment was satisfied and those in which it was reduced, the final punitive amount paid was 50 percent of the original verdict.

In interpreting these findings, it is important to keep in mind that most personal injury claims are resolved without trial. Although many practitioners assume that trends in jury verdicts are reflected in settlements, to date there has been no systematic analysis of settlement trends that would allow us to confirm or contradict this assumption.

CORPORATE RESPONSES TO PRODUCT LIABILITY LITIGATION

A key question for those considering changes in the product liability system is how the current system affects corporate behavior. In 1982 the ICJ conducted a study directed at shedding some light on this issue (Eads and Reuter, 1983). The study involved interviews with corporate product safety officials in nine large manufacturing firms that were generally recognized as leaders in the safety field; it was intended to determine how innovative corporations had responded to changes in their environment. While those interviewed had much to say about the behavior of other firms, as well as their own, the study did not constitute a broad survey of corporate behavior.

The researchers drew the following conclusion:[4]

"It is clear from these interviews that, except for firms subject to the maximally intrusive regulation of such agencies as the Food and Drug and the Federal Aviation administrations, product liability is the most significant influence on product safety efforts. Product liability, however, conveys an indistinct signal. The long lags between the design decision and the final judgment on product liability claims (frequently five or more years), the inconsistent behavior of juries, and the rapid change in judicial dostrine in the area, all tended to muffle the signal.

"That is to say, firms learned little from the results of particular litigation about either specific design decisions or the process of design decisionmaking. The frequency of suits and the level of awards provide some idea of the costs of failing to design a safe product and hence the level of effort that should be devoted to assuring a safe design. Nevertheless, considerable uncertainty remains about the most appropriate method of assuring safety in product design."

The ICJ researchers found that firms' response to product safety pressures varied depending on the inherent seriousness of the safety problems faced by the firms (e.g. how hazardous the products manufactured were), the underlying organization of the firm and the philosophy and management style of the CEO. Two of the firms the ICJ studied produced inherently hazardous products. According to the ICJ researchers, recognition of the hazardous nature of the products "permeated the[se] organization[s]," making it difficult to pin down the organizational response to product safety. Both of these firms had "experienced a substantial volume of product liability litigation," both "considered this an inevitable cost of producing the particular products they specialized in—not a sign of design or manufacturing failure," and both attempted to separate their product liability problems from their ongoing operating decisions. One firm treated product liability costs as an overhead expense, the other charged the costs to the product but only for pricing purposes. But "the fact that suits arose and judgments were paid out was not considered to impugn the product or anyone connected with its development or manufacturer."

Two of the firms the ICJ studied produced whata the researchers termed low-hazard products. Both of these firms had extremely active product safety programs, although the researchers questioned the effectiveness of one of these. The researchers attributed the concern about safety at both these firms to the "missionary" zeal of specific corporate officials, rather than to any concrete product liability experience.

In the remaining firms, said to manufacture moderately hazardous products, concern about and response to product safety issues was mixed. In some firms the response was primarily legislistic and defensive, in others it was more operational and emphasized hazard reduction.

PUBLIC EXPENDITURES FOR PERSONAL INJURY LITIGATION

Another key question facing policy-makers considering changes in the liability system involves the public and private costs of the current system. According to ICJ studies, an estimated $320 million was expended nationwide in federal and state trial courts to process personal injury cases in 1982, the latest year for which these data are available (Kakalik and Robyn, 1982). The typical public expenditure to try a personal injury suit in the federal courts was about $9200. The costs in state trial courts varied substantially depending on judge salaries and other expenses; in the three states for which the ICJ was able to obtain detailed figures the costs ranged from about $4000 to $8000 per jury-tried case. Public costs to process cases depend not only on whether a case goes to judge or jury trial but also on the amount of judge time spent hearing discovery and other motions and presiding over pretrial conferences. For example, in the federal courts a case that was filed and then settled by the parties without judicial intervention cost the courts less than $100, while a case that required a hearing and a single judicial conference but no trial cost, on average, about $2500.[5]

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[4] The researchers also reviewed the results of two industry surveys conducted, respectively, by the Machinery and Allied Products Institute and the Conference Board, and two case studies of product safety activities in half a dozen companies.

Clearly, the public costs of processing liability suits depends on whether such suits require extensive judicial intervention. An ICJ study of the largest and one of the busiest state trial courts in the nation, the Los Angeles Superior Court, found that the civil caseload is increasingly dominated by complex personal injury litigation that places heavy demands on judge time. Byu comparison with earlier periods, current civil cases are characterized by a greater use of discovery as well as more papers filed, appearances made, and motions requested. For example, in the prewar period, about a third of civil cases filed in the Los Angeles Court involved 5 or fewer litigation events—documents filed, motions, hearings, etc.—and only 13 percent involved as many as 21 such events. By the post-war period, more than 25 percent of cases involved 21 or more events; 4 percent involved 50 or more events. This increased activity has meant that even cases that settle rather than go to trial take longer to reach settlement now than did cases that settled in earlier years. In addition, in Los Angeles and elsewhere, trials, when held, take more time to complete than formerly (Selvin and Ebener, 1984). The ICJ study of Los Angeles found that it is these increases in case complexity, rather than an increase in litigiousness (as measured by per capita case filings), that have contributed to increased congestion and delay on the civil calendar.

SPECIAL PROBLEMS POSED BY MASS TOXIC TORT LITIGATION

Over the past few years, the ICJ has conducted a series of studies of asbestos personal injury litigation that highlight the special problems posed for the civil justice system by mass toxic torts. These studies have shown that:[6]

1. Asbestos cases pose a significant problem for the courts in which they are concentrated. In some courts, the number of pending asbestos claims constitute as much as 10 to 20 percent of the active civil caseload. Despite the considerable efforts and success of procedures for streamlining pretrial preparation, most of these courts have had a serious problem disposing of cases. In a few jurisdictions with large asbestos caseloads, few or no cases have been disposed of, although a significant number are said to be ready for disposition. In those jurisdictions that have attempted to use traditional approaches to disposing of the cases, at the current rate of disposition, courts will not have disposed of their current caseloads until well into the next century. Regardless of disposition approach, most plaintiffs must wait a minimum of three years and as long as five or more years until their cases are resolved. Some plaintiffs may benefit from such delays if their injuries become more evident as time elapses; others, however, may die before their cases are resolved.

2. The costs to litigate asbestos cases are higher than for any other kind of personal injury case for which transaction costs have been estimated. Through 1982, plaintiffs received on average 39 cents of every dollar expended for asbestos claims processing, while attorneys on both sides received most of the remainder. In all, about $1 billion was paid to compensate and litigate asbestos claims between 1970 and 1982.

3. The long time to resolution and high transaction costs are a consequence of the interaction between the special characteristics of asbestos cases—characteristics that they share with other mass toxic tort claims—and the substantive and procedural rules that govern the civil justice system. The latent nature of asbestos-related diseases and the manufacturing context in which they occurred raise issues with regard to the timing of filing claims, determining causation, determining liability and apportioning damages that have been dealt with inconsistently, if at all, by the various state appellate courts and local trial courts, resulting in increased uncertainty with regard to case value, delays in case processing, increased transaction costs, and inconsistent outcomes. The large numbers of claims that arose within a relatively short period of time (in part because of decisions related to timing of claims filing) have made it difficult to process cases using traditional individualized procedures. But until recently lawyers on both sides and trial and appellate judges have rejected the use of such collective mechanisms as the class action and multidis-

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[5] The ICJ is currently conducting analyses to estimate the total *private* costs of litigating tort cases.

[6] The conclusions discussed here are drawn from Kakalik et al., 1983 and 1984; and Hensler et al., 1985.

tricting as well as the use of collateral estoppel and other issue preclusion devices for these cases. Instead, what has emerged is a patchwork of *ad hoc* procedures for grouping cases and establishing settlement formulae that have generally not been subject to public debate and may, in some situations, raise serious issues of conflict of interest between the attorneys and their clients. The available alternative compensation systems, particularly the workers compensation system, do not appear to have resolved the problems observed for the tort system regarding timing of claims, standards for proving causation and issues arising out of the involvement of multiple defendants.

USE OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Finally, the ICJ has conducted a series of studies on the outcome of court-annexed arbitration programs in state trial courts. These studies have consistently indicated that such alternatives to the traditional settlement and trial system can provide acceptable outcomes to plaintiffs and defendants, with a reduction of time and litigation expense, and that streamlined procedures for resolving disputes may be perceived by litigants to be as fair—or fairer—than the traditional system. The studies also show that how these programs are designed and implemented, and whether they are adequately subsidized, are critical to determining their effectiveness and acceptability.[7]

All of the arbitration programs studies by the ICJ, however, apply to smaller value civil damage suits that are thought to pose fewer and less complex legal and factual issues than those associated with larger value cases involving rapidly evolving areas of the law. Whether alternative dispute resolution procedures such as court-annexed arbitration or other government-administered mechanisms will prove as effective for more complicated disputes involving larger amounts of money remains to be seen.

Senator **Kasten**. Thank you very much for your testimony. Our next witness will be Deborah Chalfie, who is the legislative director of HALT. Ms. Chalfie.

Ms. **Chalfie**. Thank you Mr. Chairman and members of the subcommittee, I appreciate the opportunity to testify today on S. 1999 and the need for product liability reform. I am Deborah Chalfie, legislative director of HALT—an organization of Americans for legal reform.

HALT is a national nonpartisan consumer advocacy organization with nearly 120,000 active members nationwide. Through its educational and advocacy efforts, HALT seeks to enable individuals to dispose of their legal affairs more simply, affordably and equitably than the legal system presently allows.

HALT's enormous growth since its founding is a testament to people's frustration and dissatisfaction with our civil justice system. We have received countless letters from members who have been on both sides of tort suits urging us to work harder for a more sane, equitable compensation system.

Consumers of the legal system believe that we need tort reform. Although no one has all of the hard data we might like, the data that does exist indicate that the tort system contains some inherent flaws.

First and most important, the tort system often does not deliver on what is commonly believed to be its primary objective, compensation for injury. Many innocent victims of injury receive no compensation at all. Moreover, for those who do recover something, payment is grossly unfair and misallocated. People with relatively minor injuries and low economic losses are greatly overcompensated, while those with severe injuries and high losses are greatly undercompensated.

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[7] These conclusions are drawn from Hensler et al., 1981; Adler et al., 1983; Hensler, 1986; Hensler, forthcoming.

The second major flaw of the tort system is its built-in delay. For those lucky plaintiffs who eventually do receive some compensation, the wait can average as long as 5 years. Outrageous delays mean that some victims, especially the most severely injured, will probably settle out of court for less than they deserve because they are unable to finance their medical treatment during the long wait for payment. Even worse, because of this lack of resources, some victims will forego or delay the treatment and rehabilitation they need to recover physically from their injuries.

Finally, the tort system is an extremely costly and inefficient method of awarding compensation to injured victims. The transaction costs are extremely high, and in most cases, unnecessary. Only the lawyers seem to be the consistent beneficiaries.

In explaining why HALT believes reform is needed, you will notice that I did not mention the liability insurance crisis as a reason for reform. Obviously to the extent that tort suits have some impact on the availability and price of insurance, goods, and services, consumers are concerned. But the insurance crisis is not why we need tort reform. We need tort reform for its own sake. The problems I have enumerated are inherent in the lawsuit system of compensation and exist separate and apart from any problems with the availability and price of insurance; that is, even if insurance was readily available at a reasonable price, compensation under the tort system would still be fortuitous, unfair, delay-ridden, costly and inefficient.

Reforming the tort system is no guarantee that insurance will become more available or less expensive. We need both tort reform and insurance reform, but neither is a reason for reforming the other.

As HALT has testified previously, what is most needed is a direct alternative compensation system that would exist side-by-side with the tort system. We believe proposals such as those contained in S. 1999 and Senate Amendment 100 are on the right track because they create systems that provide what the tort system cannot—full, fair, and fast compensation for product-related injuries.

Various individuals, most notably trial lawyers, have criticized the idea of an alternative compensation mechanism as unnecessary because parties can already settle out of court. While out-of-court settlements are theoretically possible, the realities of the tort system often provide incentives to fight it out.

Under the present system the manufacturer who came forward offering to pay the victim's economic losses would be viewed by the victim's attorney as admitting fault, prompting the attorney to try for a huge award in court. Likewise, the victim's attorney who only requested economic losses would probaby be viewed by the manufacturer as "not having a case," thus encouraging the manufacturer to deny liability and defend the claim to the utmost.

Defenders of the tort system also argue that alternative systems are fundamentally flawed. What these critics fail to remember, however, is that our objective here is not to create a perfect unitary system. On the contrary, the goal is a more modest one of creating an option that compares favorably with the existing tort system.

To talk about not having enough information for a consumer to make an informed choice between systems, I believe, borders on the ridiculous, because right now consumers have no choice at all.

Creating an alternative compensation system, while leaving the tort system intact, offers the best of both worlds. Those who prefer to recover their net economic loss promptly can choose the alternative system. Those who prefer to take their chances in the tort system can still do so. Having both systems in place and offering consumers a choice may well accomplish the compensation and deterrence functions of tort suits much better than having only one system or the other.

Obviously, much fine tuning still remains to be done. In order to work, the alternative system needs to have a relatively low trigger mechanism and operate under procedures that are not so complex as to turn it into a minilawsuit. Further, strong disclosure requirements for both attorneys and product-makers is of vital importance to the system's proper functioning.

The need for reform is great. HALT stands ready to assist this subcommittee in its ongoing efforts to arrive at a workable solution.

Again, thank you for inviting HALT to testify, and I would be happy to answer any questions you might have.

[The statement follows:]

STATEMENT OF DEBORAH CHALFIE, LEGISLATIVE DIRECTOR OF HALT

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to testify today on Senate Bill 1999, the "Product Liability Voluntary Claims and Uniform Standards Act." I am Deborah Chalfie, Legislative Director of HALT—An Organization of Americans for Legal Reform. HALT is a national, nonpartisan, consumer advocacy organizaiton with nearly 120,000 active members nationwide. Through its educational and advocacy efforts, HALT seeks to enable individuals to dispose of their legal affairs more simply, affordably, and equitably than the legal system presently allows.

HALT's enormous growth since its founding is a testament to people's frustration and dissatisfaction with our civil justice system. We have received countless letters from members who have been on both sides of tort suits urging us to work harder for a more sane, equitable compensation system. Accordingly, HALT has made tort reform one of its highest priorities.

We testified before this subcommittee last June on the Dodd and Gorton amendments to S. 100, and have been involved in the development of later working drafts. Earlier this month, HALT held its first national conference on legal reform, "Setting the Legal Reform Agenda." Many of the conference panels focused on tort reform, including legislative initiatives on product liability reform. Finally, HALT has been at the forefront of various efforts around the country to enact no-fault auto insurance laws and other, more responsive, compensation systems for personal injuries.

Consumers of the legal system believe that we need tort reform. This belief is grounded in consumers' experience with what is now the only avenue of recovery for personal injuries. Although no one has all of the hard data we might like, the data that does exist indicate that the tort system contains some inherent flaws. Reform is needed for three major reasons.

First and most important, the tort system often does not deliver on what is commonly believed to be its primary objective: compensation for injury. Many "innocent" victims of injury receive no compensation at all. According to the 1977 Insurance Services Office study of closed product liability claims ("Product Liability Closed Claims Survey"), one-third of all claims were closed with no payment to the injured claimant. The Department of Transportation recently reached similar conclusions in the most comprehensive study to date of one part of the tort system: recovery for auto accident injuries. In that study, the DOT reported that less than half of auto accident victims whose medical expenses were $500 or more recovered anything at all under the liability system.

Moreover, for those who do recover something, payment is grossly unfair and misallocated. People with relatively minor injuries and low economic losses are greatly overcompensated, while those with severe injuries and high losses are greatly undercompenated. The ISO product liability study found that those with economic losses of $1,000 or less recovered 482% of their economic loss, while those with losses exceeding $1 million recovered only 6% of their economic losses! This means that a person with $1,000 in expenses had a good chance of recovering $4,820, while the victim with $1 million in actual economic losses probably could collect only $60,000!

Similar misallocations in payments have been found for auto accident victims. A 1985 study by the Rand Corporation's Institute for Civil Justice, "Automobile Accident Compensation" found that victims with small losses received awards which exceeded their economic losses, while those with large losses received awards which were insufficient to cover their economic losses. There is only one conclusion that a fair-minded person could draw from these numbers: payment under the tort system is, at best, fortuitious and grossly unfair.

The second major flaw of the tort system is its built-in delay. For those lucky plaintiffs who eventually do receive some compensation, the wait can average as long as five years, according to the ISO study. Again, the DOT found similar delays in auto accident cases; accident victims waited an average of sixteen months to be compensated.

Such outrageous delays mean that some victims, especially the most severely injured, will probably settle out of court for less than they deserve because they are unable to finance medical treatment during the long wait for payment. Even worse, because of this lack of resources, some victims will forego or delay the treatment and rehabilitation they need to recover physically from their injuries. Thus, the delays inherent in the tort system often function to deny full compensation and adequate medical treatment to worthy victims.

Finally, the tort system is an extremely costly and inefficient method of awarding compensation to injured victims. The transaction costs are extremely high, and in most cases, unnecessary. Vast resources are marshalled simply to argue over fault. Compare these costs with the transaction costs of recovering under first-party collect systems such as health or fire insurance. The expense of litigation means that victims recover less money than they are entitled to and defendants pay more than they have to. Only the lawyers seem to be the consistent beneficiaries.

In explaining why HALT believes reform is needed, you will notice tht I did not mention the "liability insurance crisis" as a reason for reform. Obviously, to the extent that tort suits have some impact on the availability and price of insurance, goods, and services, consumers are concerned. But, the "insurance crisis" is not why we need tort reform. We need tort reform for its own sake.

The problems I have enumerated are inherent in the lawsuit system of compensation, and exist separate and apart from any problems with the availability and price of insurance. That is, even if insurance was readily available at a reasonable price, compensation under the tort system would be fortuitous, unfair, delay-ridden, costly, and inefficient. And reforming the tort system is no guarantee that insurance will become more available or less expensive. We need both tort reform and insurance reform, but neither is a reason for reforming the other. Both must be addressed, but separately.

As HALT has testified previously, what is most needed is a direct alternative compensation system that would exist side-by-side with the tort system. The tort system may do some things well, but its failures compel the creation of another system that overcomes those failures. We believe proposals such as those contained in S. 1999 and S. Am. 100 are on the right track because they create systems that provide what the tort system can't—full, fair, and fast compensation for product-related injuries. Moreover, if the right trigger mechanism is found, the alternative system should assist the tort system to do what many believe it does best: deterring corporate misconduct and maintaining safety incentives.

Various individuals, most notably trial lawyers, have criticized the idea of an alternative compensation mechanism as unnecessary because parties can already settle out of court. While out-of-court settlements are theoretically possible, the realities of the tort system often provide incentives to fight it out. Under the present system, the manufacturer who came forward offering to pay the victim's economic losses would be viewed by the victim's attorney as admitting fault, prompting the attorney to try for a huge award in court. Likewise, the victim's attorney who only requested economic losses would be viewed by the manufacturer as "not having a case," thus encouraging the manufacturer to deny liability and defend the claim to the utmost.

Defenders of the tort system also argue that alternative product liability systems are "fundamentally flawed" because they provide for more limited damages, fewer safety incentives, and insufficient information for the consumer to make an informed choice between systems. What these critics fail to remember, however, is that our objective is not to create a perfect, unitary system. On the contrary, the goal is the more modest one of creating an option that compares favorably with the existing system. To talk about not having enough information to make an informed choice between systems borders on the ridiculous. Right now consumers have *no choice* about how to recover. They are stuck with the tort system, complete with all of its flaws.

Creating an alternative compensation system, while leaving the tort system intact, offers the best of both worlds. Those who prefer to recover their net economic loss promptly can choose the alternative. Those who prefer to take their chances in the tort system can still do so. Having both systems in place, and offering consumers a choice, may well accomplish the compensation and deterrence functions of tort suits much better than having only one system or the other.

Obviously, much fine-tuning still remains to be done. In order to work, the alternative system will need to have a relatively low trigger mechanism and operate under procedures that aren't so complex as to turn it into a mini-lawsuit. Further, strong disclosure requirements for both attorneys and product-makers is of vital importance to the system's proper functioning. Both should be required to make the same disclosures about the existence of recovery options, an estimate of the time periods involved in recovery, the elements of proof and potential for recovery under each, and an estimate of all potential expenses associated with each option.

The need for reform is great. Finding a workable solution is not an insurmountable task, practically or politically. HALT stands ready to assist this subcommittee in its ongoing efforts to arrive at a workable solution. Again, thank you for inviting HALT to testify. I will be happy to answer any questions you may have.

Senator KASTEN. We thank you for your testimony.

Our next witness on this panel is Mr. Peter Huber. Mr. Huber.

Mr. HUBER. Good morning, Senator. I am yet another lawyer practicing in Washington, DC. I have been a conscientious student of the tort system. I do not litigate on either side of the tort law. My only claim to fame is that I have written some articles that have aroused passions—of different sorts—on both sides of the debate.

I have three rather simple points to make. The first is: Do not let anyone tell you that you are meddling with the system that has been running smoothly and in place for 200 years. The system we are addressing has been in place for just about 20 years now. It was radically transformed in the early 1960's.

Why is the crisis materializing now? Major changes in the common law take a decade to filter through the courts, and then they take another decade to filter through the insurance companies. The numbers add up, and here we are.

Most of these changes are well-intentioned. Most of these changes in the tort law were intended to promote safer manufacturing practices, and they were intended to provide fair compensation to people who seriously need it. Despite the good intentions, things simply have not worked out that way.

First of all, on the issue of deterrence or promoting safer practices. Tort litigation has indeed driven some bad products off the market that should not have been put on in the first place. But it has not been at all selective. No product is ever perfectly safe and all are, therefore, potentially vulnerable to erratic attack under this system.

The tort system that has been driving bad products off the market also now threatens to deprive us of vaccines, anesthesiology, equipment, football helmets, morning sickness, medication, and dozens of other products and services that are, on balance, good for the public health and safety.

With drugs and contraceptives and consumer products of all types, the challenge in the risk business is always to distinguish risks that are part of the problem from risks that are part of the solution. The tort system has not been doing that. I would defy the ABA or Professor Shapo or any of them to demonstrate empirically that this deterrence, which they are so fond of invoking, has been working with appropriate selectivity, distinguishing the good, the bad and the ugly in the risk world. It simply has not been doing that.

On the compensation side, the problems are even worse. The well-intentioned, contemporary tort system and the recent changes in the past two decades have not been an effective tool for compensating victims. The system is hugely capricious. Its proceedings are interminably protracted, and worst of all its agents are terribly expensive.

Let us be very clear on this. For every dollar that ends up in the pocket of the victim, our society as a whole is spending $1, $2, or perhaps $3 on lawyers; lawyers for the plaintiffs, lawyers for the defendants, judges, law clerks, expert witnesses, and miscellaneous other camp followers.

If a charity or an insurance system creamed off $2 or $3 for every dollar it delivered to the intended beneficiaries, it would be prosecuted for fraud in most States in this country. But that is precisely how our tort system is running at the moment.

I do not want to stand up and bless every sentence in your bill. I think it has some problems, but it certainly includes some important elements that should be part of the solution. First of all, it takes a sensible cut at the refractory problem of resolving issues of causation in connection with toxic torts. It simply makes no sense to argue for 2 weeks in front of a jury what is going on inside some man's lungs and what the medical causes of that condition are.

The bill sets up a framework for providing some simplified, expedited compensation to those who have been injured, and that is certainly a step in the right direction. It establishes some uniform criteria for limiting punitive damages when there has been complete compliance with Federal regulations, and that is a vitally important step in several critical areas, most especially with drugs and medical devices.

It is very hard, as Professor O'Connell stated, to predict how this bill with its occasional excesses of language will shake out in the courts. But there is absolutely no question that reform of this general character is needed.

Thank you.

[The statement follows:]

Statement of Peter W. Huber

The reach of the tort system has changed dramatically in the past twenty-five years. The tort system this Committee is addressing has not been operating smoothly for two hundred years. This Committee is addressing a system that has changed radically since the 1960s.

Many of the recent changes in the tort law were well-intentioned. They were intended to promote safer manufacturing practices and designs by producers. And they were intended to provide fair, compassionate, compensation for people who have been injured or made sick.

But things have not in fact worked out as intended.

DETERRENCE

Yes, tort litigation *has* driven some hazardous products off the market, it *has* deterred some dangerous practices. But it has also driven many valuable products and services—some of which actually *save* lives—off the market, too. No product is ever perfectly safe and none is therefore immune from attack under a capricious tort system. As a result, erratic litigation now threatens to deprive us of vaccines, anesthesiology equipment, football helmets, morning sickness medication, and dozens of other products and services that are, on balance, *good* for the public health and safety. With drugs, contraceptives, and consumer products of all types, the challenge is to distinguish risky things that are part of the problem from risky things that are part of the solution. The tort system as it is now operating utterly fails to do that.

COMPENSATION

The contemporary tort system—though, I repeat, well intentioned—has not served as an effective tool for compensating victims, either. The system is highly capricious, its proceedings are interminably protracted, and worst of all, its agents are terribly expensive. For every one dollar that (after many years) ends up in the pocket of an injured plaintiff, several dollars will be diverted to lawyers for the plaintiff, lawyers for the defendant, judges, law clerks administraive staff, expert witnesses, and miscellaneous other camp followers. If an insurance company or a charity operated with this kind of overhead, creaming off a couple of dollars in "administrative" expenses for every dollar delivered to the intended beneficiary, it would be prosecuted for fraud. At the same time, the insurance offered by the contemporary tort law is terribly capricious: Many injured plaintiffs do not recover at all through the tort law, while a quite unacceptable number of uninjured plaintiffs recover in large amount.

S. 1999

Your bill includes some important elements that could help alleviate some of these problems.

The bill takes a sensible cut at the refractory problem of resolving issues of causation in connection with "toxic" torts.

The bill sets up a framework for providing simplified, expedited compensation to those who have been injured by unreasonably dangerous products.

The bill establishes uniform criteria for limiting a manufacturer's liability when the manufacturer has complied fully with applicable federal regulations. That's vitally important in several critical areas, especially where drugs and medical devices are concerned.

The bill also establishes uniform standards in several other areas that could help, over time, to remove some of the more egregious lottery aspects of the current tort system.

To be frank, it is extremely difficult to predict just how legislation like this will shake out in actual practice in the courts. Judges and trial lawyers have been wonderfully imaginative and adept at bending words for their own purposes. This bill, if enacted into law, will take a lot of construing before we will know just what its overall impact will be.

But the bill has definitely focussed on the right issues, and adresses them, in my view, quite simply and quite sensibly.

Senator **Kasten**. Mr. Huber, thank you very much.

Because of the number of Senators that we have with us this morning and also the number of witnesses that are coming, we are going to stick to the 5-minute rule for questioning of Senators as well. We will try to get through at least one round and possibly another round if necessary, but we have got 4 more panels to come.

I would like to just say, before you run off, Professor Shapo, you said that you had not seen the data. You said that you cannot see the problem.

Now, you testified before us, I think, 4 years ago and you have been part of most of these different discussions that we have had so far. Are you saying to us that there is no problem out there as you did 3 or 4 years ago, or are you saying that the problem is getting worse but still there is no reason to be alarmed, because this is the way the system is supposed to work?

Do you think the problem is about the same, better or worse than it was when you first testified before this committee on Senate bill 100 in 1982?

Mr. SHAPO. I certainly see a lot more stories in the newspapers that report situations of people going bare; but I did not think that that was the particular point that I had made in my testimony.

What I said was that I really had not seen the data that showed that substantial numbers of judgments have imposed costs on product sellers that are not economically justified or are not fair.

Now, I also have written in my prepared testimony that it seems to me that since this body of law has been in place for quite a while now, it is fair to ask whether there are things that are happening outside the written body of law, 'including things relating to the insurance mechanism, that may be affecting the liability insurance rates which we seem to keep coming back to.

In the public prints that I read, the conversation, like the calls I get from people in the media, always turns to characterization of the problem as a liability insurance problem. That is what more of the talk is now. It is an insurance problem, it is not so much a tort problem.

So it seems to me, and here I think that I differ with Ms. Chalfie, that you really cannot talk about one without the other. I, myself, often come up against a big brick wall when I ask for the relevant information on the insurance mechanism.

Senator KASTEN. You disagree, then, with these facts that Ms. Hansler read off about the courts in Illinois and the courts in California over a 25-year period of time?

Mr. SHAPO. It seems to me, Senator, that you have to take the very interesting and laborious work that Ms. Hensler and her colleagues have been doing step by step and bit by bit. I do not pretend to have a complete command of the literature, but speaking really off the top of my head I remember three or four things from different Rand studies that it seems to me are very important for this committee to consider.

One is that at least in the preliminary draft, I guess it is Peterson on punitive damages, the showing of an upsurge in punitive damages in tort cases, if I recall correctly—Ms. Hensler can correct me—is related more to business tort cases than it is to, for example, products liability cases.

A second point relates to the study that was done on the effects of products liability law on manufacturing. I think the authors of that were Eads and Reuter, and as Ms. Hensler reports—she has better command of that study than I do, I am sure—the conclusion of that study was that the strongest single signal that was sent to manufacturers was the signal sent by products liability law.

It is true that the authors conclude that the signal is somewhat indistinct and that there is a time lag, but if I recall correctly, and I am paraphrasing here a recollection, it seems to me that what they said was, that signal says, be careful or you will be sued.

I should also note that I have received just in the last week yet another Rand study about attorneys fees, and that one I have only had a chance to glance at. I think it is fair to summarize that study as saying that the contingency fee is surely not the boogeyman that we sometimes hear that it is and that at the very least a lot more work needs to be done about the effects of lawyer's fee arrangements.

Senator **Kasten**. Let me just ask Ms. Hensler to reply briefly to the growth in settlement question that Professor Shapo referred to.

Ms. **Hensler**. Certainly I think that the empirical data that I briefly summarized with regard to changes in compensatory awards demonstrates that there have been significant changes in the way juries are reacting to personal injury suits particularly those that involve product defects and medical malpractice and particularly those that involve corporate defendants.

I suspect that because those trends are so similar between these two rather different jurisdictions that they do reflect nationwide trends, although we cannot be sure of that.

With regard to punitive damages, it is true that our study of punitive damages shows that the number of cases involving punitive damages throughout this period was relatively small and that most of those punitive damage awards were not made in product liability suits. Many of them, in fact, were made in intentional tort suits and in contract suits.

However, in the recent period, the past half dozen years, the number of awards in personal injury suits has increased, and the size of those awards has increased, and there is the same indication of a tendency on the part of juries to treat business defendants differently from other defendants, all other aspects of the cases being similar, and of a tendency to award higher punitive damages relative to the size of compensatory damages in cases involving corporte defendents.

Senator **Kasten**. Senator Hollings.

Senator **Hollings**. That is certainly true, Ms. Hensler, with respect to institutional defendants, for example, the University of Georgia; less than $500,000 actual damages, over $2 million punitive damages. The plaintiff herself said I am shocked. I am surprised to get this much money.

That is the way the people feel about institutional wrong. That is not analogous just to the tort system but also to contract suits. For example, in the Pennzoil case, around $12 billion was awarded. There was more money awarded with this verdict than in all the product liability damage suit verdicts in the last 20 years. Add them up. Is it not interesting?

Let me ask you, Ms. Hensler. Has there been peer review of your particular testimony? Has the support for your study of asbestos in courts and of mass toxic torts been recently circulated and reviewed. Has there been adequate peer review of that?

Ms. HENSLER. All of the studies that are published by the institute, in fact all the studies that are published by the Rand Corp., go through a technical review process.

The asbestos reports in particular, which I was involved with personally, went out not only to independent reviewers but to judges and attorneys in the major jurisdictions involved with asbestos cases. Those were people we had talked with, and we sent them drafts of the report and asked them for comments and corrections.

Senator HOLLINGS. I understood that recently independent reviewers tried to get the statistical evidence and other support for all the studies. The material had been either destroyed or returned, but you are saying it was peer reviewed.

Ms. HENSLER. All three of the asbestos reports as well as all of the reports that are published by the ICJ were reviewed by technical reviewers who were not part of the study staff. The technical reviewers included people who were both inside staff members and people outside who were generally regarded as experts.

Senator HOLLINGS. But where is the data now, Ms. Hensler? Do you have that data now? Independent reviewers have requested the data recently:

Ms. HENSLER. The data for the first two studies that dealt specifically with the cost of asbestos litigation and patterns in compensation for closed claims through the period for 1982 were obtained under promises of confidentiality and under the promise that the raw data would be destroyed after the studies were published.

The studies were published, and the raw data have been destroyed. The statistical analyses on which the conclusions are based are all reproduced in all of the reports.

Senator HOLLINGS. That is like the hearings we are having on the Space Program. These studies may not now undergo peer review because the data has been destroyed or returned, is that not correct?

Ms. HENSLER. The data for the studies that we are referring to were not destroyed until after the studies had been reviewed in draft form and after they had been finally published. It is fairly standard in the field when data are obtained under promises of confidentiality that there is some commitment made as to when the data will be destroyed so that they are not kept around for open periods of time.

Senator HOLLINGS. Specifically, your testimony this morning, as an expert, has that been subject to peer review?

Ms. HENSLER. Everything that I have reported here in the testimony that I submitted for the written record is based on reports which are all indicated in the list of references that appears at the end of the report.

All the studies that are indicated as having been published have been peer reviewed. There are several studies that are referred to as forthcoming. Those are in the review process.

Senator HOLLINGS. They are in the review process. I take it, really, that the testimony by all of the witnesses at the table has not been peer reviewed. Has yours been peer reviewed, Professor Huber?

Mr. HUBER. First, in the interest of full disclosure I used to be a professor but I am not practicing as one now.

Senator, I would like to hear some more about how peers review testimony. I have never heard of such a thing.

Senator HOLLINGS. Actually I have not either.

Yet, you should know since you are testifying on the bill about one provision in the bill. I will read it to you so you can hear it. In section 108, the bill reads that expert, scientific or medical opinion is not sufficient evidence to establish any fact unless such opinion has support in peer reviewed scientific or medical studies.

I would take it that if that is what we are going to require in all the cases under the bill we would want to require it of ourselves. We would not want to listen to any experts here at this witness table this morning unless your expert opinion has been peer reviewed.

I do not know if any of you folks have been peer reviewed.

Mr. HUBER. Senator, it is not folks who are peer reviewed. It is studies and it is published documents. I have been through the peer review process many times in scientific and technical publication.

Senator HOLLINGS. This bill clearly states that opinions must be peer reviewed. Your opinion this morning, was it peer reviewed?

Mr. HUBER. A number of my peers are familiar with it and have endorsed it, yes, sir, but I cannot say it has been peer reviewed. I guess that is an unfortunate term that I myself would not want to sign off on.

Senator HOLLINGS. Yes, it is an unfortunate term. I do not want to sign off on it either.

Well, so much for that. I take it, Mr. Huber, you and Professor O'Connell and Ms. Chalfie all disagree with the tort system. You believe that without the question of insurance we really should be revising this tort system, and this is a subject matter for the Judiciary Committee.

I only made that comment in light of the chairman's observation that this is the most important thing that we could take up. But I note Professor Shapo's statement that if we do take the bite out of the product liability apple, we are going to have to go to the entire orchard.

Incidentally, Professor Shapo, that is where we are. We have gone to the entire orchard. We have insurance hearings which have addressed the issue of whether to do away with McCarrann-Ferguson, and it is a problem throughout. The litigious nature of our society is a problem in a sense. It is evidenced perhaps more in contract and verdicts against institutions than it is, really, in product liability.

My time is up. Excuse me.

Senator KASTEN. Senator Danforth.

The CHAIRMAN. I want to ask anyone who cares to respond about the trigger provisions for the claims title, title II of this bill. There is a four-part trigger, and oversimplifying, but once the claimant has established that the product was the proximate cause of the harm. That is one, proximate cause of the harm; two, while being used as intended or reasonably anticipated by the manufacturer; three, then there is what is called the risk utility test under which the manufacturer can overcome a presumption of liability by showing that a person knowing of such a risk would be justified in placing the product in commerce; and four, the manufacturer must show the risk of the harm incurred was a matter of common knowledge or readily apparent.

Now, it occurs to me—well, let me ask you your views. Does the risk utility test offer much to the whole scheme here, and would it be just as well if it were to be deleted? It seems to me that that utility is always a matter of great subjectivity—in trying to decide what kinds of products are useful and what are not.

Do you think we can get rid of that third of the four items without doing any great damage to the idea?

Mr. O'CONNELL. I think any test, if I can respond first, any test of defect in the product or fault on the part of the manufacturer is going to involve, implicitly or explicitly, a risk utility test. You can exclude the language but any court is going to have to wrestle with it, and it is going to make a botch of it.

The CHAIRMAN. So you think, therefore, that putting it in would be surplusage?

Mr. O'CONNELL. I think if you did not put it in it would create confusion, and the courts would litigate for several years, whether it is in there implicitly, and then they have to decide that it is in there implicitly, and we would be back where we are now, trying to decide whether or not the product was defective or whether the manufacturer was negligent, which always involves some balancing of the risk and the utility of the product.

The CHAIRMAN. I do not understand why it would have to be—it seems to me that three of these items are not terribly difficult. Causation, whether it was used for the intended purpose and whether the plaintiff, the claimant, had some base—should have known that there was a risk involved. It would seem to me that that would be a fairly simple case.

It would become difficult, I would think, this matter of trying to weigh the utility of the product.

Mr. O'CONNELL. How can you ask a manufacturer to determine whether he is being unreasonable, as your statute phrases it, in paying if there has been some harm that is done. The plaintiff did not anticipate the harm, but the product, as Mr. Huber suggests, does enormous good. Take a vaccination. Under criteria which eliminates the utility test, I take it vaccination could be held to be wrong, or the vaccine could be held to be wrong.

In other words, what I am saying to you, directly opposite to what you are saying, Senator, is that I doubt you can do away with a risk utility test in any attempt by mandate of law to ascribe to a person responsibility for what he did. You have to say you did "x." Did it make sense to do "x"? Then when you ask did it make sense, you have to say, well, what were the benefits from doing it? What were the burdens from doing it? On the whole, do the benefits outweight the burdens? That is risk utility.

The CHAIRMAN. Do any of the other witnesses have any opinion? Professor Shapo.

Mr. SHAPO. One thing that concerns me about this sort of language, Senator, is that I am trying to picture what happens when these cases get into court and the court searches for a legal standard. It seems to me that inevitably, given the language that is used here—which is language that sounds very much like present language in the decisions—the court is essentially going to have two tiers of law where now it only has one.

Right now it has the State law, and now it is going to have Federal legislation on top of the State law.

The CHAIRMAN. Let me ask you about the risk utility test. Is that a sensible test or not? Should there be such a thing?

Mr. SHAPO. I am not sure that I can endorse it as it is put in——

The CHAIRMAN. I am not asking you to endorse the language should there be a risk utility test.

Mr. SHAPO. I cannot say that. I would like to see more judicial development on the question.

Senator KASTEN. Senator Gorton.

Senator GORTON. Professor O'Connell, we are at a high school baseball game. There is a man on first and no one out. The third baseman anticipates the batter is going to sacrifice and charges the plate. The batter hits a line drive, hits the third baseman right in the head and seriously injures him.

Should the third baseman be able to recover from the manufacturer of the ball or the bat?

Mr. O'CONNELL. There is no way one can answer such questions categorically. I would say we can structure insurance to pay him. Indeed, I have drafted an insurance contract for the National Federation of High School Associations that when an athlete is injured seriously playing in an interscholastic game he is tendered his net economic loss if the injury arose out of athletics.

Senator GORTON. I am not talking about the school district. I am talking about the manufacturer of the ball or the bat.

Mr. O'CONNELL. My contract would allow the manufacturer of the bat to join in that tender and pay part of the losses that are attendant to the student in light of the injury without litigating whether there was assumption of risk or fault because I think those questions are insoluble.

What I think you have to do is define the insured event, if you can, to exclude all those questions. When you cannot, and there are a lot of cases were you cannot, should a person who burns his hand on a stove be paid? Well, you can argue that is a risk of stoves. Should people who fall off ladders be paid?

What I would say is, you and I are not smart enough to figure out answers in advance to all the kind of hypotheticals that you are astutely putting. All we can do is, I think, use this cumbersome tort system as leverage to say if anybody can beat all those questions by just paying the person who is hurt, let him do it and get rid of all this.

Senator GORTON. Under your proposal, the one that you just outlined, would that kind of recovery be in the world of possible recovery——

Mr. O'CONNELL. Yes.

Senator GORTON [continuing]. Or for the manufacturer of the ball?

Mr. O'CONNELL. The manufacturer of the ball would say if it is going to cost us more to litigate whether we are liable than to pay the net economic loss, let us do it. But it wouldn't have to.

Senator GORTON. On another subject within your own philosophy as you have just outlined it, would a failure to remedy a defect on the part of a manufacturer, once known, once there were a series of recoveries for net economic loss, alone constitute in and of themselves an intent to injure which would bring that manufacturer into the exception you have outlined?

Mr. O'CONNELL. Absolutely not. I think we have got to be very careful about how we define intent to injure. I think we are getting ourselves in an awful problem, Senator, in workers compensation cases where we are allowing employees injured in the course of employment to claim against their employer on the grounds that the employer knew of the condition and therefore intentionally injured his employee, thereby bypassing the workers compensation exemption.

I would draft this to mean a subjective, actual, malicious intent to injure, and if we are not talking about that then we ought to let insurance pay.

Senator GORTON. The Pinto situation would not fall within that?

Mr. O'CONNELL. It would not, not in my view, unless you could prove there was criminal intent on somebody's part and the mere failure to take action on the part of people who had a lot of problems on their desk would not constitute intent to injure.

I think one of the great problems with this bill, if I can say it, is that it tries to make a distinction between negligence and gross negligence in the behavior of the consumer. I can tell you, we have been litigating the difference between gross negligence and negligence for generations, and it is a quagmire.

Senator GORTON. Professor Shapo, would you—and maybe you cannot speak for the ABA on this, Mr. Davidson—assert that there is no need—rather you do assert that there is no need to bring up the substantive law of the States in the field of product liability?

Does that mean that you believe there are no uniform provisions which the Congress could and perhaps should enact which would improve the administration of justice in this field like a uniform statute of limitations which would start to run at the time the claimant discovered or should have discovered the harm it has caused.

Mr. SHAPO. I speak only for myself. I have said in this room, I think, more than once that I think that it might be appropriate to use the rifle and not the shotgun and to have a piece of national legislation that would pick on one or two problems.

Senator GORTON. What are those one or two problems?

Mr. SHAPO. I would certainly think that the statute of limitations would be one problem. Perhaps another would be punitive damages in mass tort situations. Beyond that, I would be very, very cautious about going.

Senator GORTON. No uniform statute of repose?

Mr. SHAPO. Well, I am including that within limitations.

Senator GORTON. Choice of law provision?

Mr. SHAPO. I, myself, am not familiar enough with that body of law to be able to say, but certainly statutes of repose along with statute of limitations.

Senator GORTON. Mr. Davidson.

Mr. DAVIDSON. Senator, I appreciate the astuteness of your question, and I have to say that the ABA has no formal position other than what I have stated here and has been submitted to you.

If I can speak from a personal vantage point, I would have a very difficult time persuasively contesting some of your observations about these being the important problem areas or the question of post-accident changes. The manufacturer wants to know am I getting myself in trouble by making an improvement after something has happened.

Certainly the choice of law area has been one of the most troublesome. As you can well understand, the climate we are in here and some of the sweeping changes that have been proposed have caused a great reluctance on the part of the organized bar to advocate avenues of change that might be viewed as precipitating even broader and grander schemes, but I do not think we could candidly say to you that there is no room for consideration of some of these questions you raise.

Senator GORTON. We will wait a while before we get to a position on it.

Senator KASTEN. The train has to run them over first.

Senator Kassebaum.

Senator KASSEBAUM. Mr. Chairman, first let me say I am not a lawyer, and so I listen to all of this with a great deal of interest in an attempt to understand. I happen to believe it is an enormously important issue. We have struggled with this question over 6 years, I think, at least here on the Commerce Committee and maybe longer than that.

I find one question that is sort of beyond my understanding is the question of the assumption of risk, the intent to injure. I personally find it extremely difficult in the case that Senator Gorton mentioned whether the manufacturer of the ball and bat would be responsible for damages so awarded.

I would like to ask anybody on the panel to answer this. Is not some of the question at this particular point—because I think we have by the very nature of our society today become extremely litigious and all of us are seeking remedies as far down the line or up the line as possible—does the judge have some responsibility in making perhaps the instructions to the jury in such a fashion that it is clearly defined perhaps in a better way than it is today?

I do not know, but it seems to me a judge has an extremely important role to play in his instructions to the jury.

Mr. O'Connell.

Mr. O'CONNELL. Let me answer that. I think instructions to the jury are an illustration of the tangled mess tort law is in. The law itself, as the questions have suggested, is a tangled mess.

Is there assumption of risk? Do you want to say an athlete who has gone into a game has assumed a risk? That is a very difficult question. Do you assume the risk of being clipped in a football game viciously? Well, one jury would decide it one way, another would decide it another.

To say that any judge, any more than Mr. Zorensky, is going to be able to define all that very clearly, for, what is it that A.P. Herbert called jurors, 12 people of average ignorance so that they can understand clearly these terribly tangled questions is asking more of the judiciary than they can do.

There is an additional problem of the adversary system. If you know much about instructions to juries, they are not meant to instruct the jury. They are meant to convince the appellate court, made up of lawyers upstairs, that the judge did his job with the two lawyers on both sides trying to trap the judge into making a mistake when he charges the jury so that they will have a basis of appeal.

Senator **KASTEN**. Mr. Shapo.

Mr. **SHAPO**. I think one point needs to be made about juries, which tend to come across as another boogeyman in this discussion. That is that at least the literature that I am familiar with concerning juries and concerning the relationship of judges and juries indicates that on the whole, judges, defense lawyers and plaintiffs' lawyers think that the jury is a wonderful institution, that the statistics indicate that usually judges and juries agree, and that when they disagree the judgment has been, I think, and I am quoting the classic study, that juries have departed from the judge in a modest and subtle fashion that captures the justice of the case.

I am not sure that there is a great deal of a problem, Senator, in jury instructions. A former Supreme Court Justice said in an invasion of privacy case about 19 years ago that jury instructions are not technical abracadabra. They are supposed to be rough and ready statements to a collection of ordinary persons.

My impression is that they work pretty well.

Senator **KASTEN**. Professor Shapo, following along that line again of Senator Gorton's question of whether there should be a Federal uniformity in some way for product liability, would you not agree that with the interstate commerce that we have today that planes manufactured in Kansas, for instance, really must have some uniformity interpretation and cannot just be the individual States deciding how this can be defined?

Mr. **SHAPO**. I believe, as I have said in writing, that we are gradually coming toward a national body of tort law in this country. I think it is being developed in a most remarkable cross-country dialog among the many State courts, and I would prefer it to stay that way.

I think that if what you are interested in is uniformity, the more appropriate vehicle would be something that would parallel the Uniform Commercial Code, which was carefully developed over many years and which has, as far as I can tell, withstood the test of time because of that process of development.

I have discussed this, with you, I think, on a prior occasion and to me there is a very substantial difference between the Uniform Commercial Code and a piece of Federal legislation.

Senator **KASSEBAUM**. I would just like to add that I am one who does believe there is a correlation and something that I think we really cannot separate between the insurance and the whole problem that we find ourselves in now with liability insurance and the question of the product liability legislation as such as we define the law.

I think that we all here are searching for answers, and I would gather that all of you basically find some flaws with 1999, but perhaps through this we will be able to improve it to a point, at least, where we might feel comfortable with it, at least some of us.

Thank you, Mr. Chairman.

Senator **KASTEN**. Senator Pressler.

Senator **Pressler**. Thank you, Mr. Chairman.

In my statement I mentioned that I am very much moving in support of this legislation. I have a few minor concerns. They include the joint and several liability area. I have expressed concern about this issue in the past and am pleased that S. 1999 at least contains some type of comparative responsibility provisions.

Although I prefer the complete abolition of joint and several liability, I am anxious to hear from today's witnesses on that subject, and I am considering amendments in that area and will be exploring it in more detail later.

Regarding the attorney fee disclosure, although I certainly support the concept of attorney fee disclosures I am not convinced that section 105 of the present bill provides adequate or objective standards sufficient to address the problem. Although I am not exactly well known as a great defender of the Bar on this issue, I do believe they and the courts deserve a clear signal as to what attorneys' duties and liabilities are.

As currently written, section 105 could lead to unwarranted legal malpractice lawsuits and actually increase insurance costs. These are some things I think we have to consider.

Third, I am a little concerned about the trigger mechanisms in the bill. But we will be discussing this issue in great detail later in the hearing so I will not dwell on it here.

Finally, the arbitration cost is something I think we have to carefully consider. I am a bit concerned about the mandatory liability for arbitration costs imposed on the losing party under title II. My concern is twofold. It may be an unfair disincentive for some claimants to require them to be liable for arbitration costs that in many cases would be in excess of the award.

Two, the mandatory nature of the costs may encourage the arbitrator to decide the case based on the burdens imposed by arbitration costs rather than the merits of the case. This might be particularly true in rural or more sparsely populated areas in States like South Dakoka.

Having said that, let me ask a few questions of the ABA representative. I was handed the article from the Journal of Commerce in which there was much ado about the lawyers seeking reform of tort law, about the formation of the American Bar Association's action committee, which is here today. I am very encouraged that the Bar Association has taken this step.

I would like to ask is there any type of meaningful product liability reform legislation that the ABA would support, or what specific legislation does the ABA support in this field?

Mr. **Davidson**. Senator, our written submission indicates support for Federal legislation in the toxic tort area, occupational disease, and rather than spell out all those conditions I would prefer to rely on the written statement.

Senator **Pressler**. Aside from that, is there any bill that is up here that you would support?

Mr. **Davidson**. The ABA has not looked at each individual bill because it opposes a broadly based approach. If I might say so respectfully, the bill is one that really needs a great deal of attention even if you were for the concept. If I were the lawyer for those who prepared it, I would have to respectfully say it would require a great deal of redrafting.

Senator **Pressler**. What part of S. 1999 do you support?

Mr. **Shapo**. The ABA is generally opposed to the bill in concept generally and as stated.

Senator **Pressler**. Is there any part of it you support?

Mr. **Davidson**. I think not.

Senator **Pressler**. No section of it?

Mr. **Davidson**. Not that bill nor the concept it furthers.

Senator **Pressler**. OK, what part of the bill do you find most repugnant at this point?

Mr. **Davidson**. How much time do you have? What I would like to do with your permission is beyond my role here in representing the American Bar, since they have not looked at each individual bill, and to send a personal letter. I did spend many hours going over it and, with respect, I think it is a bill that simply would have to be set aside and redrafted even by lawyers advocating this concept.

Senator **Pressler**. Would you redraft it and submit to the committee your draft?

Mr. **Davidson**. I would not presume to be a good draftsman, but what I will do is to provide my observations on the areas where redrafting is needed.

Senator **Pressler**. But the article I have here seems to be saying that the ABA is forming this committee in a good faith effort to address this problem. Since there is so much heralding of the formation of your committee here, and I have got what I believe is the front page of the Journal of Commerce, could you present to this committee any redrafting within a week or so so we know what you propose?

This is a very prestigious committee of the lawyers that you represent, and surely other than criticizing could we have your best draft?

Mr. **Davidson**. The difficulty I would have there, Senator, is it would be contrary to the fundamental position we have taken opposing the bill in concept as a result of which I would not want it to be thought that we are favoring and urging such a bill.

I would be glad on my own initiative to show you some of the difficulties that would ensue here and the catastrophic amount of litigation in response.

Senator **Pressler**. I understand that, but then what is this much-heralded panel doing? What exactly are you doing?

Mr. **Davidson**. We are taking a look, as best we can—and I may have missed my calling here, but we are taking a look at all these many issues that were raised. You know, we had a conference a year ago, and we brought together many of the most distinguished people in these various fields. What we learned is that when you are concerned about the tort issues you're really speaking about an enormous complex of problems, 20 or 30 different fields of tort law, some of which have common problems, many of which are totally different from each other.

It is tempting and seductive to want to find a simple answer, but most of the answers will cause more trouble than the problems they seek to solve.

Senator Pressler. Let me say in conclusion—my time is up, but when this panel was announced, it was a 14-member commission, all lawyers, including representatives of the Bar, the bench, insurance companies, consumer groups. And it is expected the staff and administrative work for the commission will be done by the ABA from its headquarters in Chicago.

I really expect something out of this. They talked about their 5-year study that they had. Can we have a piece of legislation from you? Could you redraft this? Could I make that as a request? Could you take that back to your colleagues?

Mr. Davidson. I will certainly convey the request. We appreciate your confidence, but I have to tell you that we do expect important contributions in a year's time. Mr. Calabresi, who was mentioned earlier, is on our panel. We have the benefit of his thoughts and advice.

I cannot promise you a piece of legislation. It may be we will come back and tell you that is the wrong approach. I know you would want us to consider the whole question on its merits and not reach a decision before these matters are fully debated, so I cannot tell you exactly what the outcome will be. I doubt it will be a specific piece of legislation.

Senator Pressler. I think our people want some change. I think we are going to have to make some change. If you could come up with a piece of legislation we would appreciate it.

Mr. Davidson. I appreciate your comments.

Senator Kasten. Senator Goldwater.

Senator Goldwater. I am just here to listen.

Senator Kasten. Before we have the next panel, are there other questions?

I just want to make the comment that in response to Senator Gorton and also in response to Senator Pressler I think that we see a great concern about the role of the Bar Association, more specifically the trial lawyers who are not represented at this table.

Over the last few years and particularly over the last year this committee with Senator Danforth, myself and others reached out to try to find a solution. The only group of people that have either refused to admit that there is a problem or refused to participate in the discussions have been the trial bar, and on close votes, ever closer votes I understand within the ABA, the ABA continues to take the side of the trial lawyers.

In my opinion, that is not going to go on forever. We do not need more studies. I would just invite you, Professor, to come and read my mail or invite any of you to go to the Small Business Committee hearings to listen to testimony. We could spend 4 days with testimony like that of the gentleman from Rexworks and from people who are without insurance now.

Next year and the year after, people without insurance are going to be forced into bankruptcy. At that point the problems are going to become ever more severe. The numbers that are referred to in the Rand study are no longer numbers that people are quarreling about. They are facts and numbers. The dollars amount of insurance are facts. They are numbers. They are real.

Insurance companies are not making excessive profits. In fact, it is the opposite. Insurance companies in many areas are simply getting out of the business, and I think that it is simply not responsible for the Bar Association and for the trial lawyers in particular to continue to keep their heads in the sand and not participate in legislative solutions to a very, very real problem.

The CHAIRMAN. May I make one comment?

Senator KASTEN. Yes, Senator Danforth. I am finished.

The CHAIRMAN. You mentioned, Mr. O'Connell, the Joycean nature of the bill. I, myself, think it is very well done, but you are the professor and I am just a humble lawyer from the midwest.

Senator GORTON. And the chairman of the committee.

The CHAIRMAN. Mr. Huber, who has now left, has also mentioned that he had some problems.

I wonder if, certainly Professor O'Connell, Professor Shapo, and Mr. Huber but anybody else who notes specific problems in drafting or specific areas where you think that clarity is not what it should be, can you drop us a line on that?

I do not mean just to repeat general philosophical objections to the whole bill. I understand your position, Mr. O'Connell, your position, Mr. Shapo. You have basic concerns, but what I am talking about is a kind of drafting problem where, assuming that we want to pursue a policy, we do not want to unwittingly get ourselves in a situation where we are just buying needless litigation.

I just wonder if any of you, certainly Mr. Davidson—anything you say would not be taken, believe me, as an endorsement. I understand your opposition to this bill, but if you could help us at least with some of the details and the wording problems or just flag them for us, that would be very much appreciated.

Senator KASTEN. Our next panel will focus on the appropriate liability standard for the claim system. The panel will include Mr. Owen, Mr Schwartz, Mr. Kimmelman, Mr. Lyons, Professor Schwartz, and Mr. Cheek.

The committee will come to order.

Our first witness on this panel, focusing on the appropriate liability standard for the claim system and the appropriate measure of recovery, will be Prof. David Owen, the law school of the University of South Carolina.

Mr. OWEN.

STATEMENTS OF DAVID OWEN, PROFESSOR, SCHOOL OF LAW, UNIVERSITY OF SOUTH CAROLINA; VICTOR E. SCHWARTZ, COUNSEL, PRODUCT LIABILITY ALLIANCE; GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA; STEPHEN LYONS, GROUP GENERAL COUNSEL, BORG-WARNER CORPORATION; THERESA SCHWARTZ, PROFESSOR GEORGE WASHINGTON UNIVERSITY LAW SCHOOL; AND LESLIE CHEEK, VICE PRESIDENT, FEDERAL AFFAIRS, CRUM AND FORSTER INSURANCE COMPANIES

Mr. OWEN. Thank you, Mr. Chairman and members of the committee. It is an honor to be before you today.

My background in the area is that I have taught and written in products liability for 10 to 15 years and have consulted on appeals in various cases around the country.

I also was a draftsman for the first bill in the House, and in that respect, Senator Danforth, if my drafting skills can be of assistance at some point to you, please let me know.

The CHAIRMAN. Right, I think the same point for this panel and everybody else for that matter.

Mr. OWEN. I would like to address two things: First, the general advisability of the bill, including the major scheme of the bill; and second, the trigger mechanism—specifically, the risk benefit prong of the trigger.

Concerning the bill's two-part scheme—first, the expedited claims system, based on true strict liability, and, second, the retention of the negligence system for other claims—I believe that that scheme is excellent and is the best solution that this committee or the Federal Government will ever find for the products liabilities problem.

I think that the years of groundwork done by Senator Kasten and his staff in recognizing and building up a scheme to address the manufacturers' problems were an absolutely essential beginning to this process.

I believe the reason why the bill has floundered somewhat however, is because it did not adequately protect the interests of the other side of the products liability problem—the many problems of claimants that we have heard about today as well.

The approach that Senators Dodd and Gorton began and that, Senator Danforth, your bill now advances another step, is to place the products liability legislation into a proper balance, a word that has been used too much in connection with this form of legislation over the years. But now, with your bill, I believe that such a balance has finally been achieved because the consumer interest in prompt and efficient payment of real losses is now addressed in addition to the manufacture interest in avoiding the excesses of the current tort system.

I am delighted with this principal approach of the bill, and the mechanism that it establishes. Now, this is not to say it does not have some basic structural problems. Nor is it to say that it does not have a variety of technical problems that need work.

For a bill at this stage of the process—and I have watched Senator Kasten's bill work its way through—the drafting and basic organization at an early stage in the development of a major bill is really quite good. That does not say there is not considerable room for improvement, but the basic approach of the bill is very sound.

That is my first point on the bill. My second point addresses more broadly the tort reform questions raised by Professor O'Connell and Mr. Davidson in their remarks.

In my judgment, this bill takes a rifle shot approach rather than the cannon approach, to use Professor Shapo's metaphor in that the product liability area is one of the relatively discreet areas of tort law which I think is a particularly appropriate area to test a new approach to the accident problem in this country. While the field includes areas such as toxic harm that are large in magnitude, it should nevertheless prove to be an excellent experimenting ground for this type of expedited claim system as a partial replacement to tort law. Since it does not totally displace the tort negligence system, the trial lawyers should not mount as great an opposition to this bill as they traditionally do to tort reform efforts.

I think it is an excellent experiment at the Federal level to see if there is some way that accident law can be treated in a more economical, more humanistic way with everybody benefitting, and even leaving the lawyers relatively unscathed, since there are provisions for attorneys' fees.

With respect to the risk-benefit prong of the trigger mechanism, I believe that it is absolutely necessary. First, it protects the interests of manufacturers against being punished, if you will, for manufacturing good products for society. Second, it protects consumers against being injured by products which are on balance cost-ineffective, which are socially undesirable producing more injury than social benefits.

There is a very simple example based on a 1975, Wisconsin case *Vincer* v. *Esther Williams All-Aluminum Swimming Pool Co.* In this case the grandparents bought an above-ground swimming pool for their 2-year-old grandchild.

The toddler climbed up the ladder to the swimming pool while the grandparents were looking the other way and fell through the gate, which did not have a latch, into the swimming pool and was brain damaged. For a dollar or two there could have been a simple self-locking mechanism on the gate. Yet, since consumers could fully perceive the danger, the consumer expectations prong of the test would prevent would prevent liability, notwithstanding the fact that this aspect of the product was very cost inefficient in that, on balance, this aspect of the product produced much more harm than good. So, this is but one example showing how important the risk-benefit prong is in the two-prong mechanism in protecting consumers as well as manufacturers.

Thank you, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF DAVID G. OWEN, PROFESSOR OF LAW, UNIVERSITY OF SOUTH CAROLINA

For nearly a decade, products liability "reform" legislation has been before the state and federal legislatures. Most of the legislation has favored product suppliers, arising out of a perceived failure of the tort (and commercial law) system to address the problems of product accidents fairly and economically. Promoted by manufacturers and insurers, most reform legislation sprang from a perception that the consumer protection pendulum that began to move swiftly in the early 1960's had swung too far in the direction of compensation for losses from product accidents.

A study of the reported products liability decisions reveals a fair number of examples where liability for product accidents has indeed been extended too far, where persons injured by products have been permitted to recover against suppliers unjustifiably. At least four forms of overextension may be identified:

(1) *The basis of liability has sometimes been stretched too far.* Some decisions appear unfair in holding manufacturers or others liable where the hazards involved appear to have been reasonable—that is, where the products appear to have been socially useful and their risks practicably unavoidable.

(2) *Liability has sometimes been stretched too far to cover remote responsibility of the defendants.* Some defendants held liable have had insignificant connections with the relevant product.

(3) *Defenses based on product abuse have been sometimes weakened excessively.* Too many cases have permitted recovery where the plaintiff or another has subjected the product to abuses too serious to expect it to withstand a high risk of failure and injury.

(4) *Damages are sometimes far too high.* Both compensatory and punitive damages verdicts are often rendered in amounts that appear excessive.

These are some of the principal excesses of the current compensation system that have given rise to the various efforts at legislative reform of the products liability system. Most of the reform proposals, however, suffer from two very serious problems of their own: (1) They remedy certain systemic problems of product suppliers, yet largely ignore the systemic problems of product accident victims; and (2) They fail to remedy the great majority of serious problems in the present tort system.

(1) *Most reform proposals have been clearly one-sided in favor of manufacturers and other suppliers.* The many excesses of the present system summarized above demonstrate that product suppliers may well need legislative relief of some type. Expansive principles of current products liability doctrine were developed and spread rapidly across the nation in the 1960's and 1970's because of certain assumptions that continue to have considerable basis in fact and political theory. For example, it is difficult to deny that manufacturers are often in the best position to identify, evaluate and remedy product hazards, or that the safety expectations of consumers are sometimes unfairly compromised and deserving of legal protection. Nor can it be denied that many victims of product accidents are denied prompt and effective relief under the current tort system. Most of the legislative reforms to date have offered little or no help for these problems victims face under the current system.

(2) *Most reform proposals have narrowly assumed that the present tort (and commercial law) system should continue to be the exclusive mechanism for resolving product accident compensation disputes.* It is becoming increasingly clear to many observers that the current tort system, with all its strengths, has many serious flaws that undermine its ability in many instances to resolve accident loss issues fairly or efficiently. By way of example, the California Law Review several months ago published over a dozen papers in a Symposium on "Alternative Compensation Schemes and Tort Theory." Professor Gary Schwartz observed in the Foreward: "It is noteworthy that apart from the economists none of the contributors had anything affirmative to say about our existing tort system". 73 Calif. L. Rev. 548, 552 (1985).

The bill introduced by Senator Danforth, S. 1999, derived in part from earlier efforts by Senators Kasten, Dodd and Gorton, represents in my judgment the first meaningful effort at fairly and efficiently accommodating the interests of both suppliers and consumers of products that cause accidents. While various technical work on the legislation remains to be done, I believe that a large number of the problems discussed above would be remedied substantially if such a bill were enacted. The creation of an expedited claim system with limited damages, while retaining the traditional tort negligence system, should markedly improve many of the inadequacies in the present system that plague alike product suppliers and consumers. I enthusiastically endorse the reform approach of S. 1999.

Senator KASTEN. Senator Gorton. Oh, excuse me. Our next witness is Mr. Victor Schwartz.

Senator GORTON. Thank you very much.

Mr. SCHWARTZ. I am here representing the Product Liability Alliance, which is composed of over 200 organizations representing millions of American jobs.

We think that the product liability crisis is worse than it has ever been before. We are asked today not to discuss the nature of the crisis but two aspects of the expedited claim portion of S. 1999: First, whether it should be limited to economic loss, and second, whether the so-called "trigger" portion is workable and fair.

Let me discuss the matter of economic loss first. We strongly believe that under an expedited claim system a person's recovery should be limited to net economic loss. This would include medical costs, loss of wages, reasonable attorneys fees that would be required to recover for a harm.

Let me also share with you what it should not include. The collateral source rule, which is a legal rule, should be inapplicable. This rule indicates that a defendant cannot benefit from the fact that a claimant has already been paid by another, collateral source.

Every standard tort treatise in every case discussion of that rule indicates that its basis is that a wrongdoer, a negligent wrongdoer, should not benefit from the fact that the plaintiff has already been compensated by another source. Under expedited claims we do not get into the details of whether a defendant was a wrongdoer. The reason for the rule fails. It should not apply.

When one looks into the history of pain and suffering damages, one finds that it began as a sanction against wrongful conduct. Later in time it was changed into a compensatory element, but studies that have been done about damages from pain and suffering show that they do not really make a person feel better. They are really part of a fault system, and that is where they belong.

One can put forth very strong emotional cases where a person may recover a very little amount for a great deal of suffering, but if we are talking about compensation systems or alternative mechanisms that is not the place to compensate for such suffering. That belongs in the tort system.

The second topic we are going to talk about today concerns the so-called trigger provision of the expedited claims portion of S. 1999; it has added a new word to product liability parlance. The goals of an expedited claim system are clear. It should save unnecessary legal and transaction costs, provide a prompt resolution of claims, and be fair to all parties.

We do not think that the trigger as constituted in S. 1999 meets those goals. Let me share with you why. Just read one paragraph:

> The product's utility so outweighs the risk of harm caused the claimant that a person knowing of such risk would nonetheless in the exercise of reasonable care be justified in placing the product so constructed, designed or formulated in the stream of commerce. The risk of harm caused the claimant would either have been apparent to a reasonably observant person or would have been a matter of common knowledge to persons in the claimant's situation.

I could go on, but I do not want to use up my time. I do not think it is Joycean, but it is long and there are a lot of words that would require interpretation. It contains many words that could lead litigation.

The first problem with the trigger is that it utilizes a risk-utility analysis. A risk utility test as some of the other witnesses have discussed, is very complicated. The trigger does not say whether it is utility to the individual person which would vary with everybody or some type of macroeconomic utility which would mean in every case we have to a judgment about the value of a product all of society.

The second problem with the trigger, is that it uses the words "grossly negligent." My late colleague, Bill Prosser, found that the word "gross negligence" created more litigation than any other two words in all of tort law. We would not want to use words of that kind in an expedited claims procedure.

We mention a number of more specific problems with the trigger, and I am not going to go into detail. It is in the written testimony. We have established a special subcommittee to look at the trigger. As a first step, we thought instead of trying to define the trigger event we would look at it in reverse. We would list the specific situations where a manufacturer should not be liable. In other words, we would say that the manufacturer should be subject to liability for an intended use of a product unless.

But when we started to list the unlesses—unless the danger was open and obvious, unless it was an inherent characteristic, unless it was caused by the product user's own fault, unless it was a risk that was undiscoverable—we found that the list of unlesses, even if it were short, would require interpretation and litigation.

We are continuing to look at how a basic rule of liability might work. We believe that there can be a system which would expedite claims by imposing appropriate sanctions on persons who failed to settle cases in a reasonably expeditious manner. We are trying to come up with a system that will be in accord with the goals of basic expedited claim systems, which is to speed up the claim, reduce the lawyer fees, and be fair.

In sum, when you look at triggers this is what happens. The need for fairness, the need for a fair and just result, comes into in irreconcilable conflict with the need for expedition. As you set forward exceptions and rules that would make all of us comfortable with the trigger, we slow down the process and bring the lawyers back.

We are working on it and, again, thank you for your continued effort on what is the Nation's No. 1 economic problem in interstate commerce.

[The statement follows:]

STATEMENT OF VICTOR E. SCHWARTZ, COUNSEL, PRODUCT LIABILITY ALLIANCE

Good Morning, Mr. Chairman. As counsel to the Product Liability Alliance, I appreciate your kind invitation to testify about two key aspects of S. 1999, the Product Liability Voluntary Claims and Uniform Standards Act. Those aspects include: first, whether Title II, the expedited claims provision should be limited to actual economic losses and second, whether the liability standard under the expedited claim provisions set forth in Section 205 of the proposal is a fair and reasonable method of developing an alternative to the tort-litigation system. The debate about this section has added a new word to the growing Federal product liability parlance; it has become known as the "trigger mechanism".

Before discussing these issues, I wanted to thank you, Senator Danforth, and counsel to the Subcommittee, David Zorensky, for your diligence and thought in what has become the Number One economic problem in interstate commerce—the tort liability crisis. The over 200 members of The Product Liability Alliance, who employ millions of American workers, support your efforts to attempt to find a fair and balanced solution. We believe that one will be found soon, however, in order for it to work, the topics that we discuss today must be addressed in a fair and rational manner.

First, let me discuss the matter of economic loss. We strongly believe that under an expedited claims system, a person's recovery should be limited to net economic loss. This loss would be a reasonable approximation of the out-of-pocket costs that an injured person had to expand because he or she was harmed by a product. This would include reasonably needed and used medical services and rehabilitation care. It would also include lost income reduced by the amount of taxes which would be applicable to such income. Finally, it is appropriate to include an amount of reasonable legal fees and other costs reasonably incurred by the claimant in collecting such compensation.

Let me also suggest what it should not include. First, the collateral source rule should be inapplicable. The collateral source rule indicates that a defendant cannot benefit from the fact that a claimant has already been paid by another "collateral" source. Every standard tort treatise (including my own) and every case discussing that rule indicates that its basis is that a negligent wrongdoer is not supposed to benefit from the fact that the claimant, through his own providence, has obtained other compensation for his injury.

Thus, if one focuses on the reason for the rule, it is crystal clear that it should never apply when a person is being held subject to liability on a basis other than pure fault. Where an expedited claim procedure is not based on negligent wrongdoing, the collateral source rule should be abandoned. To do otherwise would diminish a major aspect of economic efficiency that should be inherent in an expedited claim system; clinging to the collateral source rule would duplicate payment in a costly and unnecessary manner.

Similar to the collateral source rule, damages for pain and suffering had its historical origins rooted in the fact that the defendant had committed a negligent *wrongful* act. Nevertheless, we have seen that courts have maintained damages for pain and suffering under modern legal theories of strict liability. Perhaps the reason for this is that innovative plaintiff's lawyers have changed the nature of these damages and have created an assumption in the minds of many that they are, indeed, compensatory in nature. This has helped form the basis of an argument that there is an "entitlement" to such damages.

Professor Cornelius Peck, of the University of Washington Law School, did a study that showed that damages for pain and suffering do not really "compensate" for anything.[1] If a person has lost a hand or an eye or an ability to have children, he or she does not, the study shows, "feel better" because he or she has received an extra pot of money.

When one leaves the tort system and moves toward a compensation expedited claims approach, one also leaves damages for pain and suffering. This has been true under workers' compensation, social security disability, and automobile nofault compensation systems. It is also true of health and accident alternative compensation approaches that exist in other countries throughout the civilized world. We appreciate the fact that strong emotionally based arguments can be made that people who have been hurt and also have not endured net economic losses should "receive something". But the place to go for such damages is the tort system where true wrongdoing has occurred. One truly makes the classic mixup of apples and oranges if one attaches either the collateral source rule or damages for pain and suffering to an expedited claim system.

The second topic that we wish to address today is far more complicated. It concerns the so-called "trigger provision" in the expedited claim portion of S. 1999. The trigger provision is set forth in Section 205. The Product Liability Alliance has submitted comments on the entire bill and a substantial portion of those comments focuses on the trigger. I would ask that our comments be incorporated as part of the record at this hearing.

The goals of an expedited claims system are clear; it should save unnecessary legal and transaction costs, provide a prompt resolution of claims and be fair to all parties. We do not think that "the trigger" as constituted in S. 1999 meets those goals. Let me share with you why. The heart of the trigger states as follows:

"(1) the Product's utility so outweighs the risk of the harm caused the claimant that a person knowing of such risk would, nonetheless, in the exercise of reasonable care, be justified in placing a product so constructed, designed, or formulated in the stream of commerce; and

"(2) (A) the risk of the harm caused the claimant would either have been apparent to a reasonably observant person or would have been a matter of common knowledge to persons in the claimant's situation; or

"(B) if the risk of the harm caused the claimant would not have been apparent to a reasonably observant person or would not have been a matter of common knowledge to persons in the claimant's situation, that (i) if the risk in question was avoidable, the manufacturer provided a warning or instruction adequate to enable a person exercising reasonable care to avoid the risk, or (ii) if the risk in question was unavoidable, the manufacturer provided information adequate to permit a person exercising reasonable care to make an informal decision whether to assume the risk."

As one can appreciate from the mere reading of a portion of the provision, it contains many words that would require interpretation and could lead to litigation. For example, the risk-utility analysis, which appears in the beginning of the trigger, is a highly complicated process that will inject economic theory on issues of benefits and feasibility of alternative designs into every case. The trigger does not suggest whether one is talking about utility of the product to the person or utility of the product to society as a whole. If it were the first, it would include a highly subjective element in the basic rule of liability. If it were the second, utility to society in general, issues of giant macro economic importance would have to be resolved daily in the process of facilitating and expediting claims. Can you imagine, Mr. Chairman, what would happen if the same concept were injected in the workers' compensation? Every time a worker were injured in the workplace, an evaluation would have to be made about the macro economic social utility of the machine or device that injured him. If workers' compensation law had taken that approach, it would not have endured.

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[1] Peck, Compensation for Pain: A Reappraisal In Light of New Medical Evidence, 72 Mich. L.Rev. 1355 (1974).

A second problem with the trigger focuses on the fact that a person has to be "grossly" negligent before his claim is barred. There has been experiments in the courts with the words, "grossly negligent", and it has resulted as my late co-author, Bill Prosser, showed, in more litigation than almost any other words that have ever been utilized in tort law.[2] It is very difficult, in practice to distinguish between gross and ordinary negligence.

A third problem focuses on the fact that the test separates evaluation of risks of a product from warnings or instructions that may mitigate those risks. It is our judgment that those factors should not be separated and that warnings or instructions should provide a balance for other factors that might suggest that liability is appropriate.

A fourth problem focuses on the situation where a product bears warnings that have been mandated by the government. They should be adequate. Title II by way of contrast specifies that adequacy is determined, with the exception of drugs, by a subjective standard.

A fifth problem also focuses on warnings. An expedited claim system, should have certainty as to when warnings should be given to the user of the product and when it is sufficient to give warnings to an intermediary.

Sixth, we believe that it is inappropriate to utilize any system that shifts assets from one party to another without requiring the person who seeks those assets to prove his case. The expedited claim provision in Title II puts the burden on the defendant to show why he should not be held liable.

Finally, we think it is inappropriate to impute knowledge of risks to a person or company when it is clear that they did not possess such knowledge. A person should be able to avoid liability by proving that he neither knew nor could have discovered a risk.

After TPLA supplied comments to the Committee, we established a special subcommittee to study the trigger. The subcommittee is still in process of deliberation, but let me share with you some of our thoughts. We concluded that we could not find a way to meet basic goals of an expedited claims system by defining the event which would lead to liability. When we would try, we would run into the same problems that exist in S. 1999; the language would be cumbersome and it would be inexpedient in nature. It would create rather than save legal costs and it would not be fair. As we tried to make the provision fair, new litigable issues would arise. We discovered that the basic goals of the system, fairness and expediency, are in sharp conflict with one another. We then attempted to approach it in a different way, similar to that set forth by Senator Dodd in his bill. That approach is to define the trigger event "in the negative". This approach sets forth a general rule of liability and then lists a series of exceptions, *i.e.,* for obvious dangers, for risks that could not be scientifically discovered at the time of manufacture, for risks that were created by the person who used the product or a third party, for inherent characteristic of a product, for situations in which adequate warnings or instructions were provided. Nevertheless, as you can see from this "short list" of exceptions, we would run into the same problem we found when one tries to define the trigger event—if the provision were to be fair, it would be inexpedient and require or lead to a great deal of litigation.

As a result of our study, TPLA is evaluating alternative approaches to expedited claims that do not involve a trigger. As other witnesses may suggest, it will focus on placing economic sanctions on either the defendant or the claimant when they unreasonably fail to settle cases.

We are also looking, with interest, at complimentary efforts to yours, such as those put forth by Senator McConnell in S. 2038 and S. 2046. These approaches do not change the rules of liability in the tort system, but rather focus on topics such as contingency fees, pain and suffering damages, the collateral source rule, and joint and several liability.

In sum, the trigger provisions stated positively or negatively do not work well in the area of product liability. If the trigger is expedient, it becomes unfair. If it is fair, it creates the very legal and transaction costs that we are trying to avoid. There may be a way to draft such a provision but we have not been able to do so. Our belief is that it is best to inject expedition in the system without setting forth standards of liability other than those incorporated in Title III.

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[2] Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 485 (1951).

Again, we cannot overstate our support for your effort, and will continue to work with you to find fair and just solutions to what has become the Number One economic problem in interstate commerce.

Senator KASTEN. Thank you very much. Our next witness is Mr. Gene Kimmelman, who is the legislative director of the Consumer Federation of American.

Mr. Kimmelman.

Mr. KIMMELMAN. Thank you, Mr. Chairman. Mr. Chairman, members of the committee, Chairman Danforth, we appreciate the opportunity to appear here today and commend you in shifting the debate on product liability to what we believe has been the major concern all along, and that is adequate compensation for those who are injured by dangerous products.

In particular, we appreciate the Danforth bill and Senator Gorton's amendment that provide specific compensation proposals to address these problems.

While we agree with many of these goals, I have to say this is one of the few times that I also agree with Victor and Professor O'Connell; we have numerous problems with the workability of this approach despite its goals. Let me explain why.

We believe that a compensation system, to add to what we have now in current tort law, must provide very quick and adequate compensation to those who have been injured, reduce litigation costs, and provide an opportunity for legitimate claims, that currently have no chance in the tort system, to be presented and receive a fair hearing.

Now, to achieve these goals the claim system must have a legal standard that is simple, as has been described already, to avoid litigation. Unless you want to compensate for all product injuries of any sort, as Professor O'Connell was describing earlier, the standard has to differentiate different kinds of behavior.

When you combine these purposes together and put it into the words of statutory language, I think the only thing you end up with is conflict. You have additional conflict if you add a penalty to the plaintiff by reducing the economic recovery in that claim system, as S. 1999 would do. And then when you put it in the real world context of the already opposing incentives of plaintiffs and defendants, you end up with one result; litigation of a lot of claims, we fear.

Let me just give you a few examples of how this may work. Take someone with considerable economic loss but no insurance coverage who is interested in filing a claim. That plaintiff under this system might be very fearful that, with a lot of money at stake, that the defendant will resist payment of the claim whether it is in a compensation system or in the tort system.

Given the incentives for litigation in S. 1999, it would be reasonble for many people to conclude that with the added benefit of pain and suffering and possibly punitive damages available in title III, its worth filing a tort suit.

You take someone else who has considerable pain and suffering, a physical impairment and no economic loss or very little economic loss. He gets very little from title II, and almost certainly would go into the tort system.

You take someone with a combination, possibly with insurance coverage of part of their economic loss, or most of it, and considerable pain and suffering. This is a close call, but there is a lot more to be gained from the tort system.

When you add on top of that the incentives of the attorneys who advise these people, it is clear in almost all cases plaintiffs' attorneys would prefer, if they can legitimately advise to do so, to litigate in tort.

The result of this, we believe, is that an exclusive choice of claims or tort system with separate liability standards for each and reduced compensation awards would result in too much litigation and could end up with consumers coming out behind.

We believe a better approach, modeled from what Professor O'Connell described earlier, would be to build on current incentives for settlement in the tort system and to augment them, where they are too weak today, to reward people for offering settlements and to penalize parties for inappropriate failure to settle. We think this can be done without eliminating either party's freedom to choose whether to go into compensation or to litigate, without limiting the amount of compensation available in the settlement's process and without preventing the right cases from being litigated. By the right cases, we mean cases where to preserve incentives to produce safer products, manufacturers of defective products should be punished.

To achieve the goals of the tort system we think the committee should shift its focus from this two-tier compensation/tort approach with reduced recovery for compensation, to an incentives model. With the right rewards for offering adequate compensation benefits through settlement and with penalties for failing to accept an adequate compensation offer, it is possible to reduce the systemic transaction costs of the tort system while providing fair compensation and maintaining incentives to produce safer products.

Thank you.

[The statement follows:]

STATEMENT OF GENE KIMMELMAN, CONSUMER FEDERATION OF AMERICA

INTRODUCTION

Public Citizen's Congress Watch [1] U.S. Public Interest Research Group,[2] Consumers Union,[3] and Consumer Federation of America [4] appreciate this opportunity to testify on S. 1999, the Product Liability Voluntary Claims and Uniform Standards Act. This legislation unlike previous product liability bills, seeks to combine an alternative compensation system with changes in the substantive and procedural rules of tort. We are encouraged that this Committee is looking at methods for providing speedier and more assured recoveries to victims of dangerous products, instead of focusing solely on altering tort rules to make it more difficult for victims of dangerous products to recover. Unfortunately, we do not believe that S. 1999's approach would bring to victims the best of either the tort world or the compensation world.

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[1] Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971, which works on behalf of its over 60 thousand members and all consumers. Congress Watch is the legislative advocacy arm of Public Citizen.

[2] U.S. Public Interest Research Group is a national, nonprofit, nonpartisan, research and advocacy organization. The group serves as the Washington, DC lobbying office for state PIRG's across the country.

[3] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications, and films, Consumer Reports, with approximately 3 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions.

[4] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

I. THE COMPENSATION SYSTEM

The goals of an alternative claims system should be to ensure quick, efficient, timely and adequate compensation for victims, certainty and consistency of outcome, and the inclusion of persons injured by products who are either expressly or incidentally excluded from the benefits of the tort system. In addition, we believe an alternative claims system should avoid replicating the negative attributes—cost, uncertainty, delay—of civil litigation. Finally, since any alternative system could be expected to supplant a significant segment of the current tort system by diverting would-be litigants from filing lawsuits, the alternative system must maintain the incentives for safety that the current tort system provides.

To meet these goals Title II mut either foster quick voluntary settlements or allow the speedy resolution of disputed claims. Given the conflicting interests of parties to such civil disputes, quick settlement can only be achieved if failure to settle carries clear, severe penalties. In addition, would-be claimants must have a clear idea of when a manufacturer's liability arises and confidence that the manufacturer's attempt to defy its legal obligations would be met with swift and severe justice in a process that imposes minimal cost and stress on the claimant. Similarly, manufacturers must have an equally clear idea of when liability arises and certainty both that attempts to evade liability would fail and such failure would be prohibitively costly.

To effect this, Title II relies on a streamlined standard of liability, "expedited" trial of issues of liability and penalties imposed on recalcitrant manufacturers. Unfortunately, these components may simpy not be adequate for the task assigned to them. We fear that victims who resort to the Title II system would face an unacceptably high risk that their claims would generate lengthy, complex litigation reminiscent of the worst features of standard tort litigation. Moreover, we believe that the very presence of this risk would continue to drive an inappropriately large number of victims into tort litigation. In addition, many legitimate claims would simpy never be filed if, as in the current system, the threat of entanglement in the rigors of Title II litigation and the fear of having to pay for legal advice continued to inhibit victims in bringing their claims to the attention of attorneys.

We are convinced that the purpose of S.1999 was to avoid these pitfalls. However, to demonstrate the basis of our concerns, we have set out below an analysis of each of the major components of the Title II compensation system. To determine the way in which these components would interact in the operation of Title II we have also plotted the course of decision-making that hypothetical victims and manufacturers would undertake in weighing the options presented by Title II.

A. The Standard

Although it appears that Title II's liability standard was intended to enhance victims' opportunities to receive compensation, its complexity may undermine this purpose. The standard would permit victims to make a claim based on the fact that they were injured by the unreasonably dangerous aspect of a product and would permit manufacturers to escape liability only if they proved that the product's utility so outweighed its risks that a reasonable, duly careful person, though knowing of those risks, would nevertheless market the product in question. (Sec. 205)

Despite the liberalized strict liability, burden-shifting foundation for this standard, we are concerned that its numerous litigable elements would severely limit Title II's ability to ensure a speedy, efficient and non-litigious claim system.[1]

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[1] In addition, we have concerns that the language in section 205 would raise numerous litigable issues inappropriate in a claims system designed to minimize litigation. For example: (1) The claimant must prove that "the product, when it left the control of the manufacturer, was unreasonably dangerous." (Emphasis added.) (sec. 205(a)) The definition of the term "unreasonably dangerous" is the major point of controversy in many product liability cases. Its use in the compensation standard would implicate an entire body of common law definitions and standards that would complicate the alternative claims system. Likewise, the question of the condition of the product "when it left the control of the manufacturer" as opposed to when it injured the product user is likely to be disputed; (2) The claimant must prove the product was used in the

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In fact, because the language used in Title II's formulation of the "unreasonably dangerous" standard was clearly derived from the decisions of appellate courts in well-known strict liability cases, and, as such was forged by those courts on the anvil of litigation, the formula alone would be as prone to engendering controversy in the Title II system as it has been in the current tort system.[2] Although Title II would require the manufacturer to show that a product's utility outweighed its risks, this may not function at all as a disincentive to litigate a claim. Instead, it could just as easily provide manufacturers with an opportunity to focus a complex inquiry on those issues, such as the utility of a product or its superiority to alternatives, which are most advantageous for manufacturers to raise.

The jurisdictions that have adopted some version of the risk/utility formula used in Title II have made it clear that the issues raised by the formula are anything but simple. In *Barker* v. *Lull Engineering Co., Inc.*, 20 Cal. 3d 413, 431, 143 Cal. Rptr 225, 237, 573 P.2d 443, 455 (1978), for example, the California Supreme Court listed the following "relevant factors":

> [T]he gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

In *Phillips* v. *Kimwood Machine Company*, 269 Or. 485, 525 P.2d 1033, 1039 n. 13 (1974) and *Roach* v. *Kononen*, 269 Or. 457, 525 P.2d 125 (1974), the Oregon Supreme Court set forth an even more explicit and detailed list of factors relevant to a risk/utility analysis of the sort required under the Title II formula:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

None of the elements enumerated by the California and Oregon courts is particularly esoteric; in fact, any common sense attempt to balance risk and utility would invariably require the decision-maker to review just these issues. Nevertheless, taken together these factors make virtually any risk/utility analysis a complex one. In a significant number of cases, a victim or a manufacturer confronting the standard with no more than the basic knowledge or description of how a product-related

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manner "intended or reasonably anticipated" by the manufacturer. (Emphasis added.) (sec. 205(a)(2)) The use of "reasonably anticipated" rather than the more settled and more justifiable "reasonably foreseeable" would add confusion to well-settled legal doctrine; (3) The manufacturer must prove that it "exercised reasonable care" when weighing the product's utility and risks. (sec. 205(b)(1)) This raises the litigable issue of whether the manufacturer would be held to the standard of care of an expert or an average person; (4) The manufacturer may have to show that the risk of harm would have been known "to persons in the claimant's situation" (sec. 205(b)(2)(A)) The issue here would be whether the standard looks at this claimant's knowledge, or the knowledge of the average claimant, i.e., whether a claimant with diminished mental capacity who did not recognize the product's dangers would be able to prevail; and (5) The manufacturer may escape liability by proving that for avoidable risks it provided adequate warnings or instructions. (sec. 205(b)(2)(B)(i)) It is not clear whether this would work in conjunction with the risk/utility test to require, where appropriate, the inclusion of safety devices rather than warnings on avoidably dangerous products, thus raising another disputable issue. Finally, one academic commentator has studied judicial application of the risk/utility test itself and concluded that it amounts to "a utilitarian balancing of risks against costs, a process that leads to frequent judgments in favor of manufacturers." James F. Britain, "Product Honesty is the Best Policy", 79 Northwestern Law Review 342, 349.

[2] See *Barker* v. *Lull Engineering Co., Inc.*, 20 Cal. 3d 413, 431, 143, Cal. Rptr 225, 237, 573. P.2d 443, 455 (1978); *Phillips* v. *Kimwood Machine Company*, 269 Or. 485, 525 P.2d 1033, 1039 n. 13 (1974).)

accident occurred would be at a loss to determine whether or not to submit to the procedures of Title II. Ironically, the issues raised under the formula are particularly suitable to the methodical, time-consuming and complicated elements of litigation. (i.e., discovery, presentation of technical evidence, expert witnesses, etc.)

Even though it would be the manufacturer's responsibility to establish that a product's utility outweighed its risks, the imposition of this burden on the manufacturer would do little to forestall litigation over the issues raised by the risk/utility test. In justifying its decision in *Barker* v. *Lull Engineering Co., Inc.*, supra at 455, the California Supreme Court observed that "most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the risk-benefit standard—e.g., the feasibility and cost of alternative designs—are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer. . . ."

Unfortunately, whenever a defendant would have the incentive to slow down the legal process and thereby delay payment of claims—as is often the case—the imposition of the burden of proof on the manufacturer would do little to neutralize the temptation to litigate created by the risk/utility formula. Instead, the burden would likely function as a lure to manufacturers to exploit their position of superior knowledge and expertise. This is especially true since in meeting their burden, manufacturers would be able to bring to the fore a full panoply of justifications for their product-designs. Indeed, as the *Barker* court observed, rather than settle cases quickly, manufacturers would be enticed to try to demonstrate the extreme care they used in developing their product designs.

Obviously, the mere susceptibility of these issues to lengthy litigation would not determine whether or not a manufacturer or victim would in fact opt for proceeding in Title II or Title III. Though Title II would leave it wholly up to the victim to choose whether or not to proceed in Title II as explained below, a manufacturer's decision to reject a Title II claim could reflect its preference for Title III proceedings. Rather, the penalties and incentives expressly provided for in Title II would have a critical bearing on a manufacturer's decision just as the uninviting prospect of bringing suit under the harsh standards of Title III would weigh heavily in the victim's decision. Yet, despite the presence of penalties and incentives, far too many cases would develop into protracted litigation as a direct result of the complexity of Title II's liability standard. For example, those victims who consider litigating under Title II would anticipate lengthy and complicated proceedings, and for this reason, many would simply choose to litigate under Title III.

In sum, then, the Title II standard would fail the bill's goal of simplicity. In so doing, it would also fail to head off litigation over the complex issues it raised—particularly since many of those issues would be especially inviting for manufacturers intent on justifying the widsom of their product-designs.

B. The Incentives

To promote settlements, Title II would penalize any manufacturer who lost in proceedings brought pursuant to section 208 following the manufacturer's rejection of a victim's claim. Manufacturers would face a mandatory 2 percent per month interest assessment on the judgment ultimately awarded and would have to pay the victim's attorney's fees. In addition, if the court found that the manufacturer lacked "good cause" for its rejection of the victim's claim it would have to award exemplary damages equal to the greater of twice net economic loss or $10,000.

While these incentives for settlement appear formidable when taken in isolation, their actual impact on a manufacturer's decision might only be modest. In fact, the efficacy of these penalties would probably not be any greater than the incentives for settlement embodied in the current tort system, nor would they consistently supersede the many other financial motivations that animate manufacturer behavior. First, virtually all current tort defendants face the threat of significant penalties if they fail to settle a case early. A manufacturer facing a product liability lawsuit today can probably expect that if it loses the case following a jury trial it will suffer a judgment many times greater in size than any settlement amount it would pay early in the litigation. What is more, for the privilege of trying and losing the case a manufacturer will also have to pay enormous fees to its defense attorneys and experts and bear the costs of diverted employee time and energy inevitably entailed in the discovery and defense process. Nevertheless, there are many instances in which the defendant manufacturers decline to offer early settlements. Instead, they persist in taking cases to trail despite the actual cost of the mechanics of litigation and the risk of paying huge awards if they lose. They also seek to coerce favorable settlements by protracting litigation despite the costs of doing so and the risk that plaintiffs will not pause "on the courthouse steps" to settle but will push on to trial.

Because the considerable settlement incentives in the current system do not work to bring about prompt, easy settlements, it would seem impossible to predict with any confidence that the penalties included in Title II would be any more effective than both the automatic penalties (*i.e.* attorney's and expert's fees, defense costs) and the potential penalties (i.e., large judgments) that manufacturers willingly brave whenever they pursue protraction/attrition/late settlement strategies or full-scale defenses at trial.[3]

Second, there are clearly other, overarching forces at work that run counter to the incentives for early settlement under the status quo and that would also run counter to the incentives contained in TItle II. These forces arise from the fact that any claim involving one product unit directly or indirectly implicates every unit sold or to be sold in that unit's product line.[4] This is obvious in cases involving mass-market consumer products. As a result, a manufacturer's decision concerning whether, when and/or how to settle a case invariably reflects a host of business considerations that lie beyond the circumstances of a particular case. For example, a manufacturer may feel compelled to maintain its share of a market by keeping a possibly defective product in that market until a superior successor product can be perfected and released for sale. In such a circumstance, the manufacturer may feel compelled to continue defending its current product, extending litigation and resisting settlement until the successor product is ready. Similary, a manufacturer may adopt a policy of resisting settlements in the belief that such resistence will head off a feared glut of claims against its product. for these reasons, an individual claim presented to a manufacturer does not arise in a closed economic system. The claim itself as well as any judicial penalties connected with it may well be dwarfed by a number of seemingly extraneous but nevertheless compelling factors. Consequently, the effect of penalties such as those included in Title II would be unpredictable at best.

At the same time, the incentives at work on the victim and his or her attorney are equally, if not more, important, since it is they who would initially decide whether to activate the compensation system by submitting a claim or to bring suit under Title III. For them Title II would offer an ostensibly easier standard of liability than that of Title III and a purportedly streamlined arbitration and adjudication process. thus, Title II would promise the likelihood of either quick settlement or a quick and favorable resolution of any dispute—strong incentives for a victim to file a Title II claim rather than brave the rigors of a Title III tort suit.

Here too, however, a comparison of these incentives with those that operate on victims and their lawyers in the current system raises serious questions about the likelihood that Title II's incentives would work to persuade victims, and especially their lawyers, to file Title II claims in the first instance. There are surely a significant number of cases where plaintiffs and their lawyers reject early, reasonable-seeming settlement offers in order to press on with litigation. In some doing, they are submitting to considerable risk that future developments in their cases will lead to smaller, later settlements or that they will lose their cases at trial. These risks are particularly severe for plaintiffs' attorneys who depend on contingencies (i.e. ultimate victory) to obtain remuneration for their work. Nevertheless, the lure of sizeable judgments and attendant large contingency fees often induces victims and their attorneys to forego reasonable settlement offers and take on the risks and delays of litigation.

Unfortunately, the options that would be presented to victims and their attorneys when they had to choose between Title II and Title III could, similary, create incentives favoring the bringing of a lawsuit in the first instance. Under Title II, victims would only recover their net economic losses; they would not receive compensation for their pain and suffering and they would not recover any amounts that they had collected from collateral sources. Also, attorney's fees would be calculated on an hourly rather than percentage-of-recovery basis. In addition, the arbitration system created by Title II for those cases where the only issue was the amount of compensation would limit the arbitrator to choosing between the respective last offer of each party. The dynamics of this system would tend to depress the amount of the victim's last offer, while, by definition, the manufacturer's offer would be even less than the victim's request. Consequently, the prospect of a judgment based on gross economic loss and an award for pain and suffering as well as much larger percentage-based contingency fees could lure victims and their lawyers to opt for the risks and delays of Title III lawsuits.

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[3] Section 208(g), which would require court approval of any settlement reached after the commencement of an action pursuant to section 208 and would authorize the court to adjust the amount of the settlement to include the penalties provided in Title II, is clearly intended to preclude a manufacturer's delay and settlement strategy. We are concerned, though, that in view of the overriding commitment to settlement shared by all the parties—the victim, the manufacturer and the court—by the time a settlement was submitted for approval, most courts (not to mention the parties themselves) would be loathe to disburb the agreement that the parties had reached.

[4] This would be particularly true under the risk/utility formula now included in Title II, which could be seen as putting an entire product line on trial every time a claim against that product is brought. This in turn might only intensify a manufacturer's perceived need or temptation to litigate.

Given the features of Title II's substantive standard, the significant difference between the recoveries and attorney's fees available under Title II and Title III, and the ubiquitous presence of a wide range of extrinsic incentives, Title II's penalties and rewards are not adequate to guarantee quick claim resolution in the crucial majority of cases.

C. The Expedited Process

Title II also provides for "expedited" procedures for victims who would seek to enforce their rights under Title II rather than initiate a tort suit following manufacturers' rejections of their claims. These expedited proceedings would be centered around a non-jury trial of the issues raised by the manufacturer when it rejected the initial claim.

Although these procedures are intended to shorten the process of resolving any dispute about a manufacturer's liability, whether the procedures function expeditiously would be wholly determined by the substantive issues to be resolved in the dispute. In other words, the proceedings could be no more expedited than the issues permitted them to be. Since the risk/utility test would raise a series of complex considerations, the proceedings would inevitably reflect those complexities. The parties would likely become involved in extensive discovery, including substantial discovery on technical issues, and would probably rely on expert testimony at trial. Thus, even though these trials would not involve juries and would be confined to issues raised in the manufacturer's denial of liability, these features would by themselves do little to simplify or accelerate the proceedings.

D. Arbitration

Perhaps the most promising elements of Title II are its provisions for arbitration, which would be available when a manufacturer declined to pay the full amount requested by the victim. The clear time limits set forth would likely produce rapid resolution of disputes. In addition, the "last best offer" restriction on the arbitrator's award would clearly induce the parties to make reasonable offers. Moreover, the assignment of costs and the presence of potential penalties could persuade manufacturers who were willing to pay, to make reasonable initial offers, and could also persuade victims to make reasonable decisions about whether to accept such offers.

Unfortunately, the benefits of arbitration would not be activated unless Title II's incentives to litigate were overcome. The elements most crucial to the success of these arbitrations would be the victim's initial willingness to file a Title II claim and the manufacturer's initial willingness to offer some payment and to see the claim settled in a rapid fashion. Yet, the inclination of both victim and manufacturer would depend on exactly the same combination of incentives for settlement—previously found to be inadequate—that the substantive standard and the litigation penalties of Title II create.

While Title II's arbitration provisions would facilitate settlements, then, the availability of arbitration would not by itself create new incentives beyond those already present in Title II's substantive standard and litigation penalties. Thus, to the extent that those incentives are inadequate to induce manufacturers to offer settlements, the arbitration system would simply not be activated.

E. The Decision-Making Dynamic

Perhaps the most revealing way to evaluate the efficacy of the Title II system in bringing about prompt settlements would be to attempt to imagine how victims, manufacturers, and their attorneys would evaluate options at the critical decision-making junctures.

1. The Victim with Substantial Net Economic Loss

Once an injury occurs and the injured party decides to pursue a legal remedy, the victim would face the initial crucial decision under S. 1999. He or she must decide whether to submit a claim for net economic loss under Title II or to initiate a lawsuit. For victims suffering substantial economic losses but with few collateral sources of compensation, Title II might seem attractive. In fact, filing a Title II claim would be advisable since even if the manufacturer declined to offer any money whatsoever, the victim would retain the right to choose between proceeding under Title II or bringing a lawsuit under Title III.

At this point the manufacturer's decision becomes crucial. As discussed above, however, the incentives brought to bear on the manufacturer are unclear at best. If the victim's claim is truly substantial, the conduct of manufacturers in the current tort system suggests that the manufacturer's initial impulse would be to resist the claim by following a course of delay and attrition with the object of either defeating the claim outright or securing a cheap settlement at a significantly later date.[5]

As discussed above, the penalties that Title II would impose on a manufacturer who ended up litigating and losing under Title II are not appreciably different from the costs borne by manufacturers who under the current system litigate and lose rather than settle. As a result, Title II offers little assurance that manufacturers would not attempt to resist substantial claims. At the same time, because of the many complex factors entailed in a risk/utility test, the process of litigating a Title II claim would readily facilitate a strategy of obfuscation, delay and attrition.

What is even more worrisome is that the existence of Title III, with its many pro-defense revisions of current tort law, would reinforce a manufacturer's incentives to reject a victim's initial Title II claim. In cases where a manufacturer faced a substantial claim, it could almost count on negating the entire Title II system and effectively throwing the case into Title III simply by rejecting the victim's Title II claim in the first instance. Following such a rejection the crucial decision-making would shift back to the victim and his or her lawyer. Since the manufacturer's rejection would rightly be understood as a signal of its intention to litigate the claim fully, the victim would be faced with a choice between two lengthy, complex discovery and adjudication processes. Though the standard would be less favorable to the defense in Title II than in Title III, both systems would offer essentially the same proposition: extensive discovery; technical issues, including both those reflecting on the wisdom of the manufacturer's product-design and those focusing on the victim's own conduct; and substantial delay. In comparing the alternatives, the salient difference in the minds of most victims would not be the legal niceties distinguishing the doctrines applied in one system as opposed to those in the other, but the fact that the reward available in Title III—total economic loss, pain and suffering and the potential for punitive damages—would be significantly greater than that available in Title II.

In most cases, these facts alone or the preception that manufacturers are likely to act in this way would persuade a victim that his or her advantage lay in pursuing a lawsuit under Title III. If these facts by themselves did not succeed in persuading the victim to choose Title III, then in many cases the victim's lawyer would apply his or her own legitimate and subtle, but still effective, powers of persuasion. When faced with the choice of representing a victim in Title II proceedings or in a Title III lawsuit, a victim's lawyer might find his or her own self-interest to lie in pursuing the lawsuit. The burden of labor on the attorney and the risk involved in proceedings would be comparable, but for the lawyer too the rewards in Title III—a percentage contingency on a larger verdict as opposed to hourly fees based on community standards—would be substantially greater.

Once a victim's attorney determined that his or her own self-interest would best be served by initiating a tort suit in Title III, the attorney could easily shape his or her advice to the victim, playing up the uncertainties and dangers of Title II, in a way that would adhere to the disclosure and loyalty requirements of both section 105 and the Canons of Ethics while convincing him or her of the advantages of bringing a Title III suit.

In sum, the initial filing of a substantial claim could easily trigger a chain of incentives—from the manufacturer's resistance and rejection to the victim's and attorney's preference for the litigation alternative that promised the greatest rewards—which would lead to a lawsuit rather than settlement. If so, S. 1999 would have failed to create a system where those with substantial net economic losses—perhaps those most vulnerable to the ills of the current system—would receive compensation for their losses in an expeditious fashion.

2. Victims With Non-Economic Loss Prototypes

For at least two other prototypical victims, S. 1999 would do little to expedite recoveries and reduce the number of lawsuits brought. First, there are many victims who suffer substantial economic losses but who also derive significant compensation benefits from collateral sources. These victims are best exemplified by a worker injured by a workplace product who collects significant amounts from workers compensation and employee benefits like health and disability insurance or an injured victim who is the beneficiary of private or public insurance. Such a victim might not even file a Title II claim in the first instance—even if his or her collateral benefits fall short of covering all economic losses. In such a case, a victim's sizeable economic loss would probably reflect a severe and/or significantly disabling injury which, in turn, would probably entail a significant amount of pain, suffering and/or impairment. Even if Title II represented the assurance of quick recovery of the balance of the victim's economic losses, that amount would surely be dwarfed in the minds both of the victim and, importantly, of his or her attorney, by the prospect of recovering gross economic loss and an award for pain and suffering in a Title III law suit. If the victim's claim against the manufacturer seemed at all viable, the victim's attorney, drawn by the prospect of far greater remuneration following success in, or even settlement of, a Title III suit, would legitimately persuade the victim to forego the apparently assured recovery of net economic loss for the prospective benefits of a Title III award.

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[5] That there has been some evidence suggesting that in the current system victims with the greatest losses have tended to recover substantially less than the full amount of their losses and to suffer long delays before recovering might well confirm this.

The choice would be even more compelling to the extent that recovery under Title II would, in fact, be somewhat less than assured. First, it would be eminently possible, if not likely in most cases, that even a manufacturer willing to make some payment would offer a smaller amount than that which the victim initially requested. The victim would then be forced to choose between accepting the smaller offer or entering into arbitration, where the last-best-offer dynamic would probably compel the victim to reduce the request he or she submitted to the arbitrator. Thus, either the victim and his or her attorney would calculate that "assured" recovery under Title II would be less than full net economic loss. This would render the greater rewards of Title III that much more attractive and would only intensify the victim's inclination to file a lawsit in the first instance.

In addition, if the victim did submit an initial Title II claim and the manufacturer rejected it outright, then the far greater recoveries avialable under Title III would certainly outweigh the differences between the liability standards in Title II and Title III. Indeed, even if the advice of the victim's attorney were "neutral" as to the two alternatives, it is hard to imagine that after hearing a detailed explanation of the intricacies of the two different types of litigation, the victim—with no fixed-dollar offer in hand—would opt for the choice that offered less reward.

The play of incentives that would be brought to bear on the decision making of the victim who suffered substantial but well-insured losses is similar to that of a victim who had suffered primarily non-economic losses of pain, suffering or impairment. Thus, the young woman who lost her reproductive capacity, the child who was permanently disfigure, the house wife whose feet were amputated, the white-collar worker who lost an arm or the retiree made blind or deaf have only a slightly clearer choice than that of a well-insured disabled worker. For the former group of victims Title II simply offers nothing. As a result, Title II would offer them no incentives that would compete with their incentives to bring a suit under Title III.

In sum, those victims whose losses were effectively or explicitly excluded by Title II's definition of net economic loss would be all but directed away from the alternative system into protracted, costly litigation under under Title III.

These decision-making scenarios serve to isolate the points of break-down or malfunction in the claims system that would be created by S. 1999. These break-down points arise in large part because the universe of incentives that act upon the decision-making of victims, manufacturers and lawyers is large and difficult to predict and control. The essential features of the bill itself—the complex, substantive standard of liability in Title II, the limited measure of recovery in Title II and the pro-defense revisions of tort law in Title III—were clearly meant to serve as devices that would re-order or tame that universe and direct victims and manufacturers toward settlement. Unfortunately, these essential features would themselves only add to the size, complexity and unpredictibility of the universe of interests. As under the current system, moreover, this complex and confusing universe would continue to foster substantial litigation and deprive injured victims of just and timely compensation.

F. Adequacy of Compensation

A fair alternative claims system must include recovery for all the harm caused by unreasonably dangerous products. While some forms of harm, like pain and suffering, are difficult to quantify, they are as real as any injury whose impact on the victim can be translated into dollars spent on health care or lost earnings. Unfortunately, S.1999 would inappropriately limit recovery of benefits in its alternative claims system to net economic loss.

1. Economic Loss

Although we do not believe that plaintiffs should receive double recovery, i.e., tort damages and public or private insurance benefits for injuries caused by unreasonably dangerous products (currently first-party insurers are reimbursed for benefits paid that are subsequently covered by the recovery in a personal lawsuit), essential product safety incentives cannot be maintained unless manufacturers of unreasonably dangerous products are held financially responsible for all economic loss resulting from such products. It would send the wrong safety signal to the manufacturing community if makers of defective products are insulated, as in Title II, from paying the full economic cost of the harm their products cause.

In addition, Title II's overly restrictive limitation on recovery for economic loss would be unfair to many plaintiffs and the general public. It make no sense to reward manufacturers of unreasonable dangerous products just because some plaintiffs have paid to insure themselves against the kinds of harm that result from injuries. Similarly, Title II would distort public policy by rewarding manufacturers of unreasonably dangerous products when their products injure people who receive benefits from public programs—like Medicare, Medicaid or Social Security—that our nation's taxpayers have chosen to finance. Rather than make the producers of unreasonably dangerous products bear the cost of the injuries their products cause, Title II's limitation on victims' recovery of economic losses would add significant costs to the many private disclocation (e.g., health, disability) insurance programs that are currently reimbursed for health care and rehabilitation costs included in product liability awards.

2. Pain and Suffering

One of Title II's greatest weaknesses is its complete exclusion of recovery for pain and suffering. It is important to remember that S. 1999 would not create an entitlment program, where everyone injured by a product, regardless of how the injury occurred, automatically received benefits. Instead, the legislation would establish a two-tier litigation system designed to yield just resolution of private disputes. We believe that in an S. 1999 litigation system, justice can only be preserved if all harm caused by unreasonably dangerous products is fully compensable.

By limiting recovery in the claims system to net economic loss, S. 1999 would unfairly exclude plaintiffs with considerable pain and suffering but little economic loss (e.g., Dalkon Shield victims) or fully insured economic loss (e.g., someone with a cradle-to-grave health, wage-loss and rehabilitation insurance policy) from Title II. People whole lives have been destroyed by product injuries that leave them economically productive but physically altered—like a white collar worker who loses an arm or a young woman who loses the opportunity to have a family—could only vindicate their rights if they overcome the new tort law burdens established in Title III.

Rather than provide swift, streamlined resolution of claims that involve pain and suffering, S. 1999 would either eliminate such claims from the civil justice system althogether, leaving victims uncompensated, or channel these claims into costly, protracted, burdensome Title III litigation. So, Title II's arbitrary limitation on recovery, particularly when coupled with substantial barriers to recovery in a Title III tort suit, only makes sense if the purpose of federal legislation is to preserve a system of protracted litigation, but with lower financial stakes—hardly a goal that would further consumers' interest in adequate compensation for all product-related injuries.

G. Scope of Coverage

We believe that S. 1999's alternative claims system should be available to as many potential tort plaintiffs as possible. Quick, efficient and adequate compensation in a claims system would substantially eliminate costly, lengthy litigation in the tort system. Unfortunately, after eliminating or severely restricting victims' rights in Title III, Title II would offer little or no relief to individuals injured by older products, drugs or toxics that cause acute harm.

1. Time Limitation on Liability

After barring lawsuits for injuries caused by capital goods more than 25 years old (section 306(b)), S. 1999 goes on to prohibit recovery for these same injuries in its claims system (section 210). In addition to constitutional concerns about such an arbitrary, pre-injury elimination of the right to sue,[6] we believe it contradicts the purpose of a claims system to deny compensation on the basis of a product's age.

In a system like Title II that is not supposed to focus on fault, or allow long and complicated evidentiary proceedings, there is no reason to bar recovery for injuries caused by the unreasonably dangerous aspect of equipment just because the equipment happends to be old. Evidence of what was known at the time of manufacture about the dangers of certain equipment, which may be difficult to find, would be irrelevant to a Title II claim; the issue in Title II is whether the product is unreasonably dangerous. While age, like many other factors, is relevant to the determination of whether a product is unreasonably dangerous, it should not automatically bar legitimate compensation claims, particularly if no other remedy is available in the tort system. We believe an alternative claims system should, first and foremost, cover claims that are difficult if not impossible to pursue in the tort system.

2. Drugs

Similarly, we do not believe that drugs should be treated differently from other products in an alternative claims system. Since Title II claims are supposed to provide individual justice based on the dangers of the particular product that caused an injury or adequacy of warning about the product, it makes no sense to exclude recovery for drug-related injuries based on a presumption about compliance with Food and Drug Administration drug approval and warning procedures (section 205(c)). We believe that compliance with FDA standards is relevant to, but not conclusive of, the determination of whether a drug is unreasonably dangerous in any particular instance. Also, since Title III would exclude most drug-injury cases from the tort system, we believe the alternative claims system should be fully open to such cases.

3. Toxics

We applaud S. 1999's inclusion of special provisions designed to make toxic harm compensable under Title II (sections 205 (d) and (e)). Since we intend to file separate testimony addressing the workability of this provision, in this document we will only comment on Section 205(d)'s scope of coverage.

While Title II's toxics provision seeks to address the difficulties of proving that exposure to a toxic substance causes a particular toxic harm many years after the exposure occurred, it does not address the very same causation problems for toxic exposure that yield more immediate (acute) manifestation of injury. Individuals who suffer acute injuries that may result from toxics or other causes—like brain damage that may either be caused by viral encephalitis or a toxic organophosphate poisoning (see *Skogen* v. *Dow Chemical Company,* 375 F.2d. 692, 697 (8th Cir. 1967))—may be unable to recover under Title II's causation provisions. Furthermore, since the definition of "product" excludes "industrial waste, atmospheric pollutants and water contaminants" (section 102(12)), many individuals injured by these types of toxic substances, who are currently not compensated through the tort system, would be excluded from the compensation system as well. We believe this should be corrected to treat all toxic harm equally under the claims system.

II. THE TORT SYSTEM

We seek a product liability system which promotes safety as its ultimate objective. Even if Title III were to provide victims adequate and speedy compensation, which we submit it does not, we still would have major concerns about the specific changes in tort law and procedure embodied in Title III. Regardless of the compensation scheme, the tort system must still function to drive from the market the Ford Pinto, the Dalkon Shield, flammable fabrics, birth control devices that cause cancer and stroke, and many other products. We fear that Title III with its rules shifted dramatically in favor of the manufacturer would not provide the necessary tug on manufacturers' economic heartstrings to remove dangerous products from the stream of commerce.

Section 302 of S. 1999 would establish a negligence standard for product liability cases involving construction and design defects and inadequate warnings. We have testified numerous times in opposition to a negligence standard in product liability cases because it would leave many victims of defective products uncompensated. This, in turn, would significantly reduce the incentives on manufacturers to produce and market safe products.

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[6] Numerous similar state statutes have been invalidated as violative of state constitutions. See *Barry* v. *Beech Aircraft,* No. 17684 (Utah Supreme Ct. Dec. 31, 1985); *Kennedy v. Cumberland Engineering Co.,* 471 A2d 195 [R.I. 1984]; *Health* v. *Sears & Roebuck*, 123 N.H. 512 [1983]; *Lackford* v. *Sullivan,* 416 So. 2d 996 [Ala. 1982].

For the purpose of evaluating S. 1999, however, we approach our analysis of the proposed changes in product liability law under a different set of assumptions. We will assume that an alternative system exists that will afford quick, full and fair compensation to product victims who choose not to bring lawsuits to recover their damages. In addition, we will assume that this alternative system will compensate many victims who are not obtaining relief under the current system.

To maximize safety incentives, the tort system must reward manufacturers of safe products and penalize manufacturers of defective products. Unfortunately, even assuming that a fair compensation system exists, Title III's liability standards would undermine these tort system goals. Under Title III's restrictive liability standards, many manufacturers would not be held publicly accountable for marketing defective products. Facing fewer successful lawsuits, manufacturers may succumb to competitive pressures to cut corners and reduce safety expenditures. In addition, restrictive tort standards that favor defendants would remove an important incentive on manufacturers to participate in an alternative claims system.

A. Construction Defects

A construction or manufacturing defect occurs when a product does not conform to the manufacturer's intended condition for that product. It is well-settled law that a manufacturer is strictly liable for injuries that result from a product with construction defect.[7] In effect, the law presumes that if a product differs from the other products in the same product line and this difference causes an injury, then something must have gone wrong in the manufacturing process, and therefore, the manufacturer should be liable.

Under section 302(b), after the plaintiff has shown that the product "deviated in a material way from the design specifications. . . or from otherwise identical units," the manufacturer may offer proof to "establish by clear and convincing evidence that it exercised reasonable care in the product's construction."

This provision would introduce the issue of the manufacturer's conduct into construction defect cases, which under current law and previous legislation supported by manufacturers (S.44 and S.100), focus solely on the condition of the product. Under current standards, the message to manufacturers is clear: they must exercise careful quality control over their manufacturing operations because they will be liable for injuries caused by construction defects in their products. By allowing manufacturers to assert their good conduct as a defense in construction defect cases, S.1999 would significantly reduce the strong safety signals that present law provides.

As courts have long recognized, the issue of the conduct of the manufacturer is inappropriate where, as in construction defect cases, the fact that the product is defective is obvious.

B. Design Defects

Currently, all but four states use strict liability as the standard in design defect cases. We believe this standard works best to compensate product victims and to provide strong safety incentives.

Section 302(c) would establish a negligence standard for design defect cases. In addition to requiring a plaintiff to prove simple negligence, the section provides two defenses for manufacturers which would deny compensation to many victims of negligent conduct.

First, section 302(c)(2) requires a plaintiff to prove that "a manufacturer exercising reasonable care would not have used the design or formulation that the manufacturer used." (emphasis added.) By holding a defendant to the standard of a "reasonable manufacturer," this provision would allow manufacturers to escape liability by showing that other manufacturers have used the same design for their products. If this standard were the law, it would provide a potent disincentive against the devlopment of new safety precautions for products.

In a 1932 product liability case decided under a negligence standard, the court recognized the regressive public policy implications that such a "custom and prectice" defense would carry when it stated, "The fact that the custom of manufacturers generally was followed is evidence of due care, but it does not establish its exercise as a matter of law, Obviously, manufacturers cannot, by concurring in a careless or dangerous method of manufacture, establish their own standard of care."[8]

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[7] *Markovich* v. *McKesson & Robbins, Inc.*, 106 Ohio. App. 265, 149 N.E.2d 181 (Ohio 1958) (plaintiff's hair fell out after using home permanent); *Paul* v. *Rogers Bottling Co.* 183 Cal.App. 680, 6 Cal. Rptr. 867 (1960) (dean mouse in bottle of soda); *Langford* v. *Chrysler Motor Co.*, 373 F.Supp. 1251 (E.D.N.Y 1974), aff'd 513 F.2d 1121 (2d Circuit 1975) (automobile has defective part which caused collision).

In addition, manufacturers should be held to the level of care expected of experts or professionals in their fields. This requirement is necessary to encourage manufacturers to be aware of and adopt recent developments and technologies that would increase the safety of their products.

Section 302(c) also provides that a manufacturer has been negligent in designing a product if the manufacturer failed to exercise due care "at the relevant point in time." The bill defines this as the earlier of "the time of manufacturer of a product or certification of an aircraft or its parts or accessories by the Federal Aviation Administration."

This provision could have devastating results for plane crash victims because it would relieve airplane manufacturers of liability for accidents that result from defects they became aware of after the time of government certification. By removing an important incentive to correct defects in airplanes, many more travelers may fall victim to accidents in the air. Especially in a time of increased airplane accidents, the airline industry should not receive preferred treatment in the product liability system.[9]

Furthermore, the conduct of a manufacturer in producing a product should be judged at the time the product reaches the product user, not at the time of manufacture. For example, some foods, drugs and chemical products will become dangerous if not used within a certain period of time. A manufacturer should be responsible for injuries arising from such products if it foresees that a consumer will use them after they became dangerous.

C. Failure To Warn or Instruct

Section 302(d) would establish a negligence standard for cases involving inadequate warnings or instructions. While negligence is currently the rule in many jurisdictions, a number of courts apply a strict liability test to warning cases. For example, in *Phillips* v. *Kimwood Machine Company,* the Oregon Supreme Court stated that, "The article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable in selling the article without a warning considering what he knew or should have known at the time he sold it." [10]

Even in states that require a showing of negligence in failure to warn cases, the burden on the plaintiff is considerably less than what would be required under section 302(d).

First, the section provides that a manufacturer has been negligent in providing warnings or instructions unless the warnings "would not have materially affected the conduct of the product users." This would put the burden on plaintiffs to prove they would have heeded the warning had it been provided. A better rule, which is followed by strict liability and negligence states and by the Restatement (Second) of Torts, comment j, would establish a presumption that had a warning been given, it would have been read and adhered to.[11]

Second, the standard in section 302(d) would require the trier-of-fact to consider "the likelihood that the product would cause harm of the type alleged." This requirement may enable a manufacturer to escape liability for foreseeable injuries if they are "unlikely" to occur. For example, manufacturers may not be responsible for warning of death or serious injury that could result among people who are allergic to their products if such allergies are rare, even though the manufacturers know that these allergies exist.

The prevailing standard in warning cases is a fairer rule. It requires a manufacturer to exercise due care in warning users of potential dangers associated with the intended and reasonably foreseeable uses of its products, even where the percentage of users injured is not large.[12]

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[8] *Marsh wood Products Co.* v. *Babcock & Wilcox Co.,* 240 N.W. 392, 396 (Wis. 1932).

[9] In 1985, there were 26 serious airplane accidents worldwide, resulting in over 2,000 fatalities, while in 1984 there were 12 such accidients causing 323 deaths.

[10] 269 Or. 485, 525 P.2d 1033 (1974), In accord, *Jackson* v. *Coast Paint & Lacquer,* 499 F.2d 809 (9th Circuit 1974); *Berkebile* v. *Brantly Helicopter,* 462 Pa. 83, 337 A.2d 893 (1975); *Hamiliton* v. *Hardy,* 37 Colo.App. 375, 549 P.2d 1099 (1976); *Little* v. *PPG Industries,* 92 Wash.2d 118, 594 P.2d 911 (1979).

[11] *Technical Chemical Co.* v. *Jacobs,* 480 S.W.2d 602 (Tex. 1972); *Nissen Trampoline* v. *Terre Haute First National Bank,* 332 N.E.2d 820 (Ind.Ct.App. 1975) rev'd other grounds, 265 Ind. 457, 358 N.E.2d 974 (1975); *Wolfe* v. *Ford,* 6 Mass.App 346, 376 N.E.2d 143 (1978).

[12] *Borel* v. *Fibreboard Paper Products Corp.,* 493 F.2d 1076 (5th Circuit), cert. denied 419 U.S. 869 (1973). See also, *Littlehale* v. *E.I. duPont de Nemours & Co.,* 268 F.Supp. 791 (D.C.N.Y.),

Continued

D. Post-Manufacture Failure To Warn or Instruct

This section would impose an obligation on a manufacturer to provide post-manufacture warnings or instructions if the manufacturer learns of a danger in its products after the products left the manufacturer's control. As in S. 1999's failure to warn provisions, this standard is too limiting because it includes the same language regarding "likelihood of harm."

In addition, this provision would not adequately serve the interests of safety because it does not require recalls and repairs of defective products that are dangerous even when accompanied by warnings and instructions. In order to protect the public from known product hazards, this section must explicity state that, where appropriate, the manufacturer is required to recall and repair dangerously defective products.

E. Warnings to Third Persons

A warning about a product's dangers is of little value if it is not transmitted to and understood by the product user. The law recognizes this be requiring, in most instances, that the manufacturer provide the warning to the ultimate product user.[13]

Courts also recognize, however, that this may create an unreasonable burden on manufacturers in certain cases. Therefore, most jurisdications consider four criteria to decide whether a warning may be provided to a third person: (1) the likelihood that the harm will occur if the warning is not passed on to the user; (2) the magnitude of the probable harm; (3) the likelihood that the third party will pass on the warning; and (4) the burden on the manufacturer of warning the ultimate user.[14]

In contrast, the standard in section 302(f)(1) might enable a manufacturer to escape liability for not supplying warnings directly to the product user in many more circumstances. The section provides that a manufacturer may warn a third person if that person "could be expected" to act to avoid the product user's harm or to pass on the warning to the user. Presumably, depending on whose point of view one looks from (and the bill does not specify), many people "could" be expected to inform the user of the warning. The more appropriate inquiry is whether the warning will be transmitted and what will be the consequences if it is not.

Section 302)f)(2) would allow a manufacturer to provide warnings to a "supervising expert" if the product may be legally used only by or under the supervision of such an expert. This is most often the case when the product is a drug or medical device.

Under current law, in cases involving prescription drugs, a manufacturer's duty to warn extends only to the physician or other "learned intermediary." [15] If, however, the manufacturer knows or should know that the drug will be sold or administered without the intervention of an individualized medical judgment, the duty to warn runs directly to the product user. For example, in a case in which an eight month old girl became permanently paralyzed as a result of an oral polio vaccine administered by a public health nurse, the court held that, ". . . as in the case of patent drugs sold over the counter without prescription, the manufacturer of a prescription drug who knows or has reason to know that it will not be dispensed as such a drug must provide the consumer with adequate information so that he can balance the risks and benefits of a given medication himself." [16]

Current law governing third party warnings is fair to manufacturers because it considers the burden of providing warnings to product users, while it protects consumers by requiring direct warnings in most cases.

F. Express Warranties

In order for a manufacturer to be found liable for damages from a product that does not conform to an express warranty, section 302(g) requires a plaintiff to prove that: (1) the warranty relates to the harm-causing aspect of the product; (2) the

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aff'd., 380 F.2d 274 (1966); *Louisiana-West* v. *Hydro-Test Inc.*, 196 So.2d 598 (1st Circuit 1967); *Montgomery Elevator Company* v. *McCullough*, 676 S.W. 2d 776 (Ky. 1984).

[13] *Wright* v. *Carter Products*, 244 F.2d 53 (1957); *Crocker* v. *Winthrop Labs*, 514 S.W. 2d 429 (Tex. 1974); *Tomer* v. *American Home Products*, 170 Conn. 681, 368 A.2d 35 (1976).

[14] *Shell Oil Co.* v. *Gutierrez*, 581 P.2d 271, 278 (Ariz.App. 1978); see also, *Seibel* v. *Symons Corp*, 221 N.W. 2d 50 (N.D. 1974); *Griggs* v. *Firestone Tire and Rubber Co.*, 513 F.2d 851 (8th Circuit) cert. denied, 423 U.S. 865 (1975); *Russell* v. *GAF Corp.*, 422 A.2d 989 (D.C. 1980).

[15] *Dyer* v. *Best*, 118 Ariz. 465, 577 P.2d 1084 (Ct.App. 1978); *Brochu* v. *Ortho*, 642 F.2d 652 (1st Circuit 1981).

[16] *Reyes* v. *Wyeth*, 498 F.2d 1264, 1276 (5th Circuit) cert. denied, 419 U.S. 1096 (1974); see also, *Davis* v. *Wyeth*, 399 F.2d 121 (9th Circuit 1968).

product failed to conform to such warranty; and (3) the failure of the product to conform to such warranty caused the claimant's harm.

Provisions (2) and (3) describe a plaintiff's burden under traditional express warranty law. The added requirement that the warranty related to the "harm-causing aspect of the product" is ambiguous and appears to be an unnecessary restatement of provision (3). If it is more than this, it would place an additional burden on the plaintiff which may preclude recovery in inappropriate circumstances.

G. Product Seller Liability

The law in most states holds product sellers, such as wholesalers, retailers and distributors, to the same strict liability standards as manufacturers.[17] Courts have cited a number of strong public policy reasons for treating product sellers and manufacturers alike in product liability cases.

First, product sellers can, and often do, inspect and test their products for quality and safety. Therefore, it is fair to hold sellers responsible for injuries that these products cause. Second, by holding product sellers to a high standard of care, the law encourages quality control practices, which will lead to safer products. Third, product sellers can exert substantial pressure on manufacturers to produce safe products by refusing to carry unsafe and untested goods. Sellers will be most inclined to apply this pressure if they are held responsible with manufacturers for dangerously defective products.

Section 303 would establish a negligence standard for product sellers in cases involving construction and design defects and inadequate warnings. However, as in S. 1999's other liability standards, the provisions in this section are more restrictive than traditional negligence standards.[18]

Under section 303(b)(2), product sellers are liable for failing to warn only if they fail "to provide any . . . written warnings or instructions received while the product was in the product seller's possession and control; or to make reasonable efforts to provide . . . warnings and instructions which it received after the product left its possession and control." The use of the word "received" implies that the product seller is responsible only for passing along warnings that have been provided by another party, such as the manfacturer. It is important that the product seller also be required to warn of dangers that the seller has independently discovered.

Section 303(b)(3) would provide a complete defense to product sellers who show there was "no reasonable opportunity to inspect" the product that caused the consumer's injury. S.1999's standard for product seller liability already requires a plaintiff to provide that the product seller failed to exercise reasonable care with respect to the product. While the fact that the seller had no reasonable opportunity to inspect the product is evidence of the seller's due care, it should not preclude consideration of other factors important to the determination of negligence.

H. Punitives

We oppose S. 1999's treatment of punitive damages. The punitive damage provisions contained in Section 305 would substantially weaken an effective legal tool for deterring and punishing irresponsible corporate behavior. Regardless of what compensation system is envisioned, the residual tort system must be preserved as a means of punishing manufacturers who place profit over health and safety. Punitive damages must be maintained in full force to deter manufacturers and others from acts of misconduct in the future.

Section 305 generally would: 1) elevate the burden of proof to a clear and convincing standard of evidence, making it more difficult to obtain punitive damage recoveries; 2) establish a trifurcated trial procedure, increasing legal fees and delays in obtaining punitives; 3) transfer the power to determine the amount of a punitive reward from the jury to the judge; and 4) establish compliance with government standards as an absolute defense to punitive damage awards. Each of these features would undermine the safety incentives created by the threat of punitive damages.

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[17] See, e.g., *Kleve* v. *General Motors,* 210 N.W.2d 568 (Iowa 1973); *Vandermark,* v. *Ford,* 391 P.2d 168 (Cal. 1964); *Dunham* v. *Vaughan and Bushnell,* 247 N.E.2d 401 (Ill. 1969); Restatement (Second) of Torts, Section 402A, comment f.

[18] Another problem with the product seller provisions of S. 1999 lies in section 102(13)'s definition of "product seller." The section defines product seller as a person who "sells, distributes, prepares, blends, packages, labels, or otherwise is involved in placing a product in the stream of commerce, or who installs, repairs, or maintains the harm-causing aspect of a product. "(emphasis added.) A person who "prepares, blends, installs, repairs or maintains" a product usually has as much control over and contact with the operation of that product as does the manufacturer. Therefore, it is inappropriate to hold such persons to a different standard of liability for harms caused by their products.

1. Preemption

Section 305 is designed to preempt state law on punitive damages, yet it exempts all states which prohibit punitive damage assessments. Only four states—Louisiana, Massachusetts, Nebraska and Washington—disallow punitives. Since uniformity is the stated objective of this section and of the entire bill, we believe it is nonsensical to exempt these few states from its coverage, especially where such coverage would expand plaintiffs' rights.

2. The Evidentiary Burden

The standard of proof for punitives under Section 305(a) is "clear and convincing" evidence, while the standard for obtaining compensatory relief under Title III is still the traditional "preponderance of the evidence" rule. The imposition of this elevated standard of proof, which is nearer to the criminal standard, "beyond a reasonable doubt," would make it more difficult for plaintiffs to prevail in a punitive damage case.

3. Standard for Obtaining Punitives

Section 305(a) states that punitive damages may be awarded where the harm suffered as the result of conduct demonstrating manufacturer's or product seller's "conscious flagrant indifference to the safety of those persons who might be harmed by a product." (emphasis added)

This formulation of the standard of proscribed conduct is far too narrow and would eliminate cases where punitives are appropriate. Most courts have rejected the "flagrant" standard and favor broader, more traditional liability standards, such as "willful," "wanton," "malicious," "conscious *or* reckless disregard of the rights of others."[19] At the very least, Section 305 should allow punitives for reckless behavior. Punitive damages should be employed to punish and deter reckless conduct as well as conscious indifference to safety concerns. The manufacturer's or product seller's reckless or conscious indifference to safety or the rights of others is sufficient to describe the type of behavior punitives are designed to reach. The standard is also unduly confusing. The language suggests that the defendant could escape a punitive damage assessment if he were to show that the plaintiff (though injured) "was not a person who might be harmed by the product."

4. Procedures

Under Section 305(b), of a plaintiff wishes to pursue punitive damages, he or she would face three separate proceedings: the first to determine whether compensation damages should be awarded, the second to determine whether punitive damages should be awarded, and the third to determine the amount of punitives. This trifurcated system would increase the cost to consumers of bringing a punitive damage claim and may discourage plaintiffs from acting as private attorneys general prosecuting socially deleterious conduct. Accordingly, plaintiffs must first prevail on their negligence claim and then proceed to another trial where much the same evidence will be presented on punitive damages. Under current law, judges upon motion, may separate these proceedings to prevent undue prejudice. Since courts already have the authority to separate these functions, it is unnecessary to require this procedure by statute.

Pursuant to Section 305, the power to determine the amount of punitives would be transferred from the jury to the judge. In most states the amount of punitive damages is left to the discretion of the jury, which considers the seriousness of the defendant's injury as measured by compensatory damages. (See Restatement (Second) Section 980(2) comment b-e). Courts have vested in the jury wide discretion to assess the amount of punishment because juries are best suited to act as the conscience of the community, and reasoned judicial review of subjective issues concerning the level of reprehensibility is difficult.[20] As Secretary of Commerce Malcolm Baldridge explained to the Cabinet Council on Commerce and Trade: "The role of the jury, as tempered by the authority of the judge to reduce the amount of the award, is made central to our judiciary system by the Seventh Amendment to the Constitution." [21]

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[19] (Owens, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 University of Chicago, 21 (1982)).

[20] (Owens, supra at 44. See also: *Armstrong* v. *Republic Realty Mortgage Corporation,* 631 F2d 1344, 1353 (8th Cir. 1980); *Hoene* v. *Associated Dry Goods Corporation,* 487 S.W. 2d 479, 486 (Mo. 1972); *Maxey* v. *Freightliner Corporation* 450 F. Supp. 955, 966 (N.D. Tex. 1978).)

[21] (Memorandum from Secretary of Commerce Malcolm Baldridge to Members of the Cabinet Council on Commerce and Trade, September 3, 1982).

S. 1999's transferrance of authority from jury to judge is wholly unnecessary as a means to control unfair application of punitive awards. Judges already have at their disposal methods for reducing any potential for unfairness. The clear trend is that judges are scrutinizing and are using remittitur, reversal on appeal or pretrial rulings to eliminate injustices against manufacturers or product sellers.

5. Compliance With Government Safety Standards as a Defense to Punitives

Section 305(c) would allow manufacturers and product sellers to escape punitive damages where they establish compliance with federal government safety standards, statutes or specifications. This absolute bar to punitives is totally unjustified. Under present law, compliance with a federal standard is only some evidence of due care, but should not be given conclusive weight.[22]

Government safety standards do not necessarily establish an acceptable level of safety, and in fact may only establish a minimum safety floor. This provision undercuts safety incentives by allowing manufacturers to be shielded from a punitive award, just because they may have complied with a hopelessly outdated and/or under-protective standard. Moreover, this defense may actually encourage manufacturers to take a lowest common denominator approach to safety, since they would not be punished for failing to take adequate safety precautions where a government standard required far less care.

The rationale for disallowing compliance with government standards as a defense to punitives was clearly stated in *Gryc* v. *Dayton-Hudson Corporation,* 297 NW 2d 727, (Minn.) cert. den. 449 U.S. 921 (1980). In *Gryc,* manufacturers of highly flammable children's nightwear attempted to use their compliance with the Flammable Fabrics Act as a defense to a punitive damage claim. The court ruled that the fabric manufacturer could not defend itself conclusively from punitives by proving its compliance with a government regulation widely known to be far too lax to have any real protective effect.

Compliance with government standards is highly probative of the manufacturer's conduct and therefore is an appropriate factor for a jury to consider in a punitive damage case. However, such compliance with government standards should never serve as an automatic bar to punitive liability.

I. Expert Testimony

S. 1999 would severely limit the role of expert witnesses in product liability lawsuits and in the alternative claims system. Currently, experts are chiefly engaged in plaintiffs and defendants to assert their studies professional opinions on a wide range of issues—from appropriate standards to care—to causation—to state of the art. While we recognize that reliance on experts adds cost to the product liability system, we view these costs as the necessary evil of an adversary process in an advanced technological age.

Section 108 would provide that expert scientific or medical opinion is not sufficient evidence to establish any fact unless such opinion has supported in peer reviewed scientific or medical studies. (emphasis added.) It is not clear whether the testimony of engineers or economists would constitute scientific opinion. But assuming that the provision is construed in its most narrow sense, the testimony of physicians offering opinions about their own patient's condition would not even be sufficient to establish the nature and extent of the injury or disease at issue.

Peer reviewed studies are excellent sources from which to corroborate expert opinion. However, there may be perfectly reliable and supportable medical or scientific opinions which have not appeared in peer reviewed journals. Thus, where no peer reviewed study exists supporting a medical or scientific conclusion, the trier of fact might be forced to substitute its own lay judgment on a technical issue, since S. 1999 would require them to discount the expert's testimony. Moreover, we believe juries should have the opportunity to hear specific evidence which represents new or minority (non-peer reviewed) opinions, as well as consensus viewpoints. Because juries are charged with deciding questions about safety, they should be allowed to hear the most up-to-date insights on every issue.

According to prevalent trial procedures, judges vigorously review the qualifications of experts before allowing their testimony on a given fact. In the event experts are deemed qualified to present their opinion, the fact that the opinions are contradicted by a peer reviewed study would affect the weight given to the testimony.

The procedures for handling expert witnesses employed in counts throughout the country provide adequate safeguards against any prejudice which may result from deficient scientific or medical testimony. A determination as to the sufficiency of the testimony is correctly left with the trier of fact and should not be dictated by statute.

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[22] See. *Brothu* v. *Ortho Pharmaceutical Corp.* 642 F2d 652, 658 (1 Cir 1981); *Chambers* v. *G.D. Searle,* 441 F. Supp. 377, (D Md. 1975).

J. Record Retention

The enactment of the provisions dealing with the preservation of records contained in Section 104 would make the present product liability litigation system function with greater efficiency and at less cost to the litigants. If Section 104 were the law, parties to litigation would be more encouraged to come forward with requested documentary evidence in order to avoid the imposition of monetary penalties and unfavorable presumptions.

Section 104 would also serve to discourage common corporate document destruction programs which have been institutionalized into such innocuous sounding programs as "preventive maintenance" or "law compliance" and may include a "document retention schedule" to "eliminate misleading, improvident or erroneous" documents for the purpose of optimizing the corporation's position in the event of litigation." [23] In a survey questionnaire to the committee members of the American Bar Association in December of 1980, more than 50% of those responding answered that they either often or always encounter compliance programs that further "policies that reduce historical records." [24] Where documents or physical evidence are destroyed or unavailable the result is: more searching time consuming discovery, longer trials and a higher likelihood of error by the factfinder.

Section 104 would require manufacturers to retain documents for 25 years which assess risks or hazards connected with their products, and incidents of death, injury, or illness alleged to have resulted from the use of their products. This section further establishes sanctions against manufacturers who willfully destroy documentary evidence, by requiring the court to levy monetary penalties (incuding attorney fees) and by allowing the imposition of a rebuttable presumption that the destroyed evidence would have established the fact adverse to the position of the violator. Further, the court *may* impose this presumption, where evidence was negligently destroyed, if no other means are available to establish the fact at issue.

We applaud the scope of this provision and commend Senator Danforth for recognizing that destruction of documents presents a huge problem for civil litigants. However, it is unclear how this provision would actually work in practice since the operation of the penalties and presumptions depend upon proving the existence of a document which may no longer exist. Additionally, finding evidence of negligent behavior may be like finding the needle in the haystack. While Section 104 would help ensure the survival of many documents, plaintiffs would still have extreme difficulty identifying the evidence to search for, and how and where to find it.

Notwithstanding these concerns, we would urge the inclusion of penalties for the destruction of tangible or physical evidence, in addition to documentary evidence. For example, victims injured by defective automobiles often encounter great difficulty producing the injury causing component of the car.[25] In testimony submitted to this Committee on S. 100, March 21, 1985, Congressman Cecil Heftel testified that the manufacturer through its insurance agent ordered the car junked even before he had the opportunity to register a complaint with the car company.

Additionally, we recommend that product sellers as well as manufacturers be required to preserve records. Product sellers are in a better position than manufacturers to hear complaints from customers about the products they sell. Thus, product sellers also should be required to maintain records, or face tough penalties.

While enactment of Section 104 would greatly improve the attenuated and costly discovery process, we fear that manufacturers would still take advantage of the lawyer—client privilege to avoid or delay disclosing information about product dangers, would still obtain protective orders precluding the disclosure of evidence, would still smother plaintiffs with rooms full of documents to thwart meaningful discovery, and would still force plaintiffs to prove facts already estalished in previous lawsuits. The record retention provision, while laudatory, is not sufficiently protective of plaintiffs by itself to transcend the pro-manufacturer tilt of Title III. Plaintiffs would continue to run an uphill race to prove their case under the standards and proof requirements of S. 1999.

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[23] [Oesterle, "A Private Litigant's Remedies For An Opponent's Inappropriate Destruction of Relevant Documents," 61 Texas Law Review 1185 [1983]); (See also Bishop, "Establishing a Records Management Program," 88 The Office 213, 215 [1978]. "A document destruction program is insurance."]

[24] (Beckenstein & Gabel "Antitrust Compliance: Results of a Survey of Legal Opinion," 51 Antitrust L.J. 459, 493 (1982)).

[25] (See *Smith* v. *Superior Court,* 151 Cal App. 3d 491, 198 Cal Rept. 829 (Jan. 1984); *Rock Island Bank & Trust* v. *Ford,* 54 Mich. App. 278, 220 N.W. 2d 799 (1974); *Ostendorf* v. *International Harvester,* 89 Ill. 2d 273, 433 N.E. ed 253 (1982); *Rozier* v. *Ford,* 573 F2d 1332); See also *Depuy Inc.* v. *Eches,* 427 So.2d 306 (Fla. App. 3 Dist. 1983).

K. Statute of Repose

Consumers and workers injured by 25 year old capital goods would not have the right to pursue a claim under Title II (Sec. 210) or a lawsuit under title III. (Sec. 306(b)) Thus, S. 1999 would automatically cut off remedies even before the injury or death occurred or before these claims reasonably could be asserted. This automatic cut-off would operate to prevent recoveries, irrespective of the useful life of the product, which varies greatly from one product to the next.

It is illogical to bar just, provable claims, without any regard to the underlying cause of the injury solely because of the age of the product. Moreover, we fear that such an arbitrary prohibition would inevitably lead to fewer safety precautions in the design and manufacture of products having a useful life beyond 25 years.

We view these provisions as unduly harsh and unnecessary. Most successful product liability lawsuits do not involve old products. One comprehensive study revealed that only 2.7% of the products involved in product liability actions were purchased more than 6 years prior to the injury causing event.[26] A survey of Utah's manufacturers similarly showed that only one of its 500 members had a claim filed against it for injuries resulting from products more than 6 years after the original purchase.

In constrast, we commend S. 1999's inclusion of a statute of limitations which allows plaintiffs to file complaints within two years of the time they discovered, or should have discovered, the harm and its cause. (sec. 306(a)). This provision would remedy the regressive limitations periods that still exist in some states, which require plaintiffs to sue within two or three years from the time they were exposed to the harm-causing product. Under these standards, victims of products whose harms are not manifested until many years after the exposure have been unfairly excluded from the opportunity to receive compensation from the manufacturers responsible for their injuries.

III. THE DISADVANTAGES OF A TWO-TIER CLAIMS/TORT SYSTEM

The fundamental flaw in S. 1999, and all other legislation that attempts to separate compensation from tort law through a two-tier, exclusive choice system, is that the two-tier approach inherently sends confusing, contradictory signals to the parties in a personal injury dispute. Regardless of the underlying purpose for establishing such systems, if they change the legal standards of current tort law and add separate, new standards for compensation, it is virtually impossible to prevent considerable litigation over the liability standards in both tort and compensation.

Since personal injury cases vary dramatically, covering all types of injuries from all types of products and involving all types of behavior, many factors must be taken into consideration in tort litigation. Efforts to simplify the analysis of such issues, like S. 1999's repeated use of "reasonableness" as a standard of behavior in all contexts, cause the two tiers to converge (i.e., Title II's reasonable behavior standards are similar to fault-based standards that are intended only to apply to Title III's tort rules) and thereby reduce the incentives to choose reduced benefits from a compensation system rather than full damages from a not-so-different tort system. On the other hand, efforts to fine-tune the legal standards for compensation by delineating separate factors for legal scrutiny (i.e., Title II's differing legal rules for when an injury-causing product was being used as expected rather than in an unusual but potentially foreseeable manner) either invite litigation—especially where lots of money rides on close legal questions—or altogether exclude injured parties from the civil justice system.

IV. AN ALTERNATIVE APPROACH

Although we object to the manner in which S. 1999 combines an alternative claims system with federalized tort law, and we have strong concerns about many of the substantive provisions of the bill, we believe there is a way of meeting Senator Danforth's goals without restricting individual rights or weakening product safety incentives. To achieve the goals of speedy, adequate compensation for individuals injured by defective products, the two-tier approach must be abandoned in favor of a unified, streamlined tort system with rewards for early settlement and penalties for protracted, unnecessary litigation.

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[26] (See Massery, "Date of Sale Statutes of Limitation: A New Immunity for Product Suppliers," 1977 Ins. L.J. 535, 542 (citing I.S.O. 1976 Products Liability Closed Claim Survey.)

A. Exploit Existing Settlement Incentives

The most practical, predictable and equitable way to improve the tort system would be to augment, reinforce and refine its existing incentives for early settlement. Although we have not worked out all the details of such an alternative, we offer a number of suggestions that illustrate how an incentives approach could work.

Victims injured by defective products have certain "built-in" incentives to settle their claims quickly. Not only are most people averse to the uncertainty and stress of the lengthy litigation process, they are also eager to have their financial losses covered, and their suffering redressed, as quickly as possible. To succeed in inducing settlements, an alternative system must include a mechanism that would trigger these incentives. Clearly, the best inducement to settlement would be an offer of compensation that victims deemed adequate for their economic and non-economic losses. At the same time, to reinforce this incentive, the system must also include penalties on victims who unjustifiably reject offers of adequate compensation.

Unfortunately, manufacturers do not have such clear-cut incentives to settle cases in the current tort system. Even though litigation is costly and unpredictable, manufacturers are often drawn into court by potential cost savings that make litigation worthwhile—like drawing out litigation until plaintiffs, desperate for resolution of their claims, give up or settle for less money. If such manufacturers were instead rewarded for offering reasonable settlements early in the dispute, the interests of plaintiffs and defendants would be united.

The most reliable way to ensure that all parties feel greater pressure to settle disputes quickly is by authorizing courts to reward and punish parties for their behavior in attempting, or refusing, to settle cases. For example, parties should be required to file with the court formal notices of their offers to settle before trial. If, at the end of trial, the jury has rendered a judgment that is the economic equivalent of, or less than, any offer of settlement the manufacturer made before trial, and the court finds that the plaintiff was unreasonable in refusing the offer, the court should penalize the plaintiff for declining the offer and reward the manufacturer for have made it.

Specifically, the court, taking a wide range of factors into account, should be permitted to deny the plaintiff an award of statutory court costs and/or pre-judgment interest where litigation results in awards similar to or lower than settlement offers. In addition, the court should be permitted to grant the defendant an offset based on the compensation the plaintiff has received from certain other sources. Finally, in cases where the jury finds for the defendant after the defendant made a reasonable pre-trial offer of settlement, the court should penalize the plaintiff's lawyer for pursuing a frivolous lawsuit. These panalties would provide plaintiffs with a heightened interest in early settlement in many cases, but would not subvert plaintiffs' interests in two crucial scenarios: 1) where the settlement offer was inadequate or 2) where the manufacturers behavior, as supported by the evidence, was so clearly unacceptable that the injured party will settle for nothing less than legal vindication. Litigation of such cases would continue to be appropriate since we believe these to be the very cases that, when litigated, send the strongest signals for increased product safety.

For manufacturers, this approach would offer a large reward for making a reasonable, timely settlement offer. By offering reasonable, early settlements, manufacturers would reduce their economic exposure at trial (i.e., court costs, pre-judgment interest and award-reduction by the amount obtained from collateral sources).

B. Streamline the Tort System

It is important to streamline tort litigation because even with strong settlement incentives, numerous cases which still go to trial. We believe that: small (less than $50,000) claims should be mediated rather than adjudicated; toxic exposure cases should be treated separately under federal law (see Appendix A): and sanctions for delay, frivolous motions or defenses, and destruction of evidence or the defective product at issue should be strengthened. With this finetuning of the tort litigation process, the incentives to reach reasonable, early settlements would become more obvious to both plaintiffs and defendants. Rather than tempt manufacturers to manipulate complicated legal standards for the purpose of delay, or risk overzealous litigation by plaintiffs who fear inadeaquate protection in a claims system, it makes sense to seek simple adjustments who impact can clearly be predicted.

CONCLUSION

Although we agree with many of S. 1999's goals, we believe the legislation falls far short of achieving its purpose. By severely limiting compensation awards and skewing tort law against individuals injured by dangerous products, S. 1999 would fail to preserve tort law goals of adequate compensation and product safety. In addition, the bill's two-tier claims/tort system would send confusing, contradictory signals that may foster considerable litigation, rather than swift dispute resolution.

We believe S. 1999's two-tier approach should be abandoned in favor of a unified, streamlined tort system with rewards for early settlement of disputes and penalties for protracted, unnecessary litigation. This approach would achieve the objectives of speedy, adequate compensation for individuals injured by defective products, without weakening the product safety incentives of the tort system.

Senator **Kasten**. The next witness is Mr. Stephen Lyons, group general counsel of Borg-Warner.

Mr. Lyons.

Mr. **Lyons**. Thank you Mr. Chairman and members of the subcommittee.

I am here today on behalf of the Coalition for Uniform Product Liability Law. My background has been rather mixed. I learned my tort and insurance law under Professor O'Connell, although after he hears my testimony this morning he may want to dispute that fact.

After that I went into private practice for myself. I represented the plaintiffs, but I spent the last 10 years in what I could call trench warfare, managing the tort litigation for Borg-Warner Corp.

Mr. Chairman, the coalition appreciates your efforts and those of the staff in crafting S. 1999. Also, we appreciate the opportunity that you provided us to comment on the draft in its original form. Indeed, we are delighted that you chose to accept many of the suggestions which we made.

Nevertheless, because of the concerns regarding the standard of liability in title II the coalition is unable to support the bill as it is presently drafted. Our testimony this morning will summarize some of these concerns.

I would like to emphasize two critical areas of concern for the coalition: First of all, the basis for compensation in general; and second, the manner of establishing toxic harm in particular.

Under section 205 of the bill, a manufacturer will be liable whenever a product is unreasonably dangerous and the unreasonably dangerous aspect of the product was the proximate cause of the plaintiff's harm. Most manufacturers would not dispute that point, I do not think.

Section 205 goes on to presume that a product is unreasonably dangerous unless the manufacturer makes a dual showing that: First, the product's utility outweighs the risk of harm, and second, the risk of harm was obvious or in the case of nonobvious risks adequate instructions and warnings were provided.

Perhaps the most striking aspect of this standard is the reversal of the axiomatic principle of tort law which requires that a plaintiff has the burden of proof. Instead of requiring the plaintiff to prove that the product is unreasonably dangerous the burden is shifted to the manufacturer. While this dramatic reversal of the burden of proof is troubling, the limited defenses available to the manufacturer further exacerbate the problem.

The sole defenses are either that the product was misused in an unanticipated manner or the product's utility outweighs its risk, and such risk was obvious or adequately warned against. The difficulties of fairly applying the risk utility analysis escalates as the seriousness of the harm increases.

How does one quantify the utility of a piece of sporting equipment? We heard the hypothetical before by Senator Gorton. Furthermore, how does one quantify the utility of a piece of equipment that might, on its face, appear to be far more beneficial like a heart pacemaker? If, for example, 1 in 1,000 people have an allergic reaction to the implantation of a heart pacemaker, for that individual did the risk outweigh the utility?

I do not think the bill addresses this, and I think other members of the panel have pointed out that there is some lack of clarity in that regard.

Even assuming that the manufacturer can satisfy the risk utility test which will be difficult as we have learned in certain States that now employ that test, the warning requirements in the bill as currently drafted offer little guidance.

We made suggestions to draft one which I think should be incorporated in the bill. Such modifications would give the manufacturer the proper guidance necessary to comply with the adequate warnings and instruction requirement.

Taken as a whole, the standard of liability in section 205 would make manufacturers liable, like insurers, for any harm caused by their products, regardless of the claimant's conduct or the safety of the product.

For this reason the coalition urges that the committee return to the approach in staff working draft number one, which is essentially a fault standard, whereby compensation would be required only where a person exercising reasonable care would not have placed the product in commerce.

Turning to the toxic harm issue, section 205 of the bill now provides that where a claimant has been exposed to a product in a manner that would significantly increase his risk of toxic harm, the product shall be conclusively presumed to have been the proximate cause of the claimant's harm. For this purpose, an increased risk of 30 percent is deemed significant.

This 30-percent trigger is unfair in a couple of respects. If the cumulative effect of other causes would have made it likely that such other causes were responsible for the harm, yet none of such other causes singly was more likely to cause the harm, the manufacturer still must pay. It leaves the manufacturer who is sued in that particular case in the position of paying on a claim when in fact the contribution of his product may in fact have been a very small one, taken as a whole. Furthermore, the bill as it is currently drafted, requires that the manufacturer pay for all of the toxic harm, not just the excessive amount.

We agree with the idea of exploring the possibility of establishing an alternative dispute resolution mechanism. Removing the settlement process from the time-consuming and expensive tort litigation system will significantly reduce transactional costs and the time required to compensate the wrongfully injured claimant.

In attempting to reach a more efficient claims procedure, however, we should not unleash a system that greater facilitates the filing of frivolous or fraudulent claims, thus increasing the costs. In many respects the basis for compensation as set forth in title II is similar to other statutory compensation schemes.

As we know, some of those statutes have resulted in virtual open-ended liability for manufacturers. It is not the appropriate time to place further financial liabilities on manufacturers in this country. To do so would make them less competitive with what now is a real competitive threat from foreign imported products. I think that unless there are some limitations placed on liability, which are not currently in the bill, we run this risk.

Senator KASTEN. I would ask that you summarize your statement. Your time is expired.

Mr. LYONS. Trading the number of multimillion dollar cases for a multitude of smaller but, in the aggregate, even greater claims is not the solution to this serious problem. The solution lies in reforming the current system in a manner that will provide for prompt and fair settlement of legitimate claims.

Essential to such a system is the retention of proximate causation based upon known scientific fact and a determination of liability based upon the relative fault of the parties.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF STEPHEN LYONS, ON BEHALF OF COALITION FOR UNIFORM PRODUCT LIABILITY LAW

Good morning, Mr. Chairman and Members of the Subcommittee. I am Stephen Lyons, Group Vice-President and General Counsel of the Borg Warner Corporation. I am representing the Coalition for Uniform Product Liability Law (CUPLL), a group of over 300 manufacturers, large and small, from around the country. These members, and the over 100 trade associations who are affiliated with CUPLL, are seeking the enactment of a fair and uniform product liability bill. On behalf of the Coalition, I would like to thank the Committee for this opportunity to testify on S. 1999.

Mr. Chairman, we appreciate your efforts and those of your staff in crafting S. 1999. Also, we appreciate the opportunity that you provided us to comment on the Staff Drafts which preceded the introduction of S. 1999; indeed, we are delighted that you have accepted many of the suggestions which CUPLL made with respect to the bill. Nevertheless, because of our concerns regarding the standard of liability in Title II, the Coalition is unable to support the bill as it is presently drafted. Our testimony this morning will summarize these concerns.

BASIS FOR COMPENSATION

Section 205 of the bill sets forth the basis under which a manufacturer will be required to provide compensation. The standard is that a manufacturer will be liable whenever a product that left its control was unreasonably dangerous and the unreasonably dangerous aspect of the product was a proximate cause of the claimant's harm while the product was being used in its intended and anticipated manner.

Further, section 205 presumes that a product is unreasonably dangerous unless the manufacturer makes a dual showing that: (1) the product's utility outweighs the risk of harm and (2)(A) the risk of harm was obvious or (B) is the case of non-obvious risks, adequate instructions or warnings were provided to enable a person exercising reasonable care either to avoid the risk or to make an informed judgment about accepting an unavoidable risk.

Perhaps the most striking aspect of this standard is its reversal of the axiomatic principle of tort law that requires the claimant to bear the burden of proof. Instead of requiring the claimant to show the unreasonably dangerous nature of the product, that element of the claim is assumed. It is then the manufacturer's burden to show that the product was not reasonably dangerous because it met the dual conditions of section 205(b). While this dramatic reversal in the burden of proof is troubling, the limited defenses available to a manufacturer under section 205(b) greatly exacerbates the problem.

The sole defenses are that (1) the product was misused in an unanticipated manner, or (2)(A) the product's utility outweighs its risk and (B) the risk was obvious or adequately warned against. For some products, it is difficult to quantify their utility. Take a lawnmower. What is the utility of a machine which cuts grass? How do you quantify the utility of a piece of sports equipment such as a baseball bat? Even for those products where the utility can be clearly determined, such as a heart pacemaker, how is that utility balanced against the risk? For example, if only one person in a thousand has an allergic reaction to the materials in a pacemaker, can it be said that, as to that particular person who was injured, the benefit outweighed the risk?

Even assuming that manufacturers can satisfy the risk-utility test, which will be difficult, the additional provisions of section 205(b) as applied to warnings offer little protection to a manufacturer. In the case of non-obvious risks, the bill requires that a warning be provided which is adequate to enable a person exercising reasonable care to avoid the risk. Yet the bill does not address to whom such warnings must be provided. Unless the bill specifies those circumstances when the warning must be given directly to the product user and those situations, such as in the workplace and to learned intermediaries, when a warning may be provided to a person other than the product user, a manufacturer has little chance of showing that a product was not unreasonably dangerous.

Taken as a whole, the standard of liability in section 205 (a) and (b) would make manufacturers liable like insurers for any harm caused by their products regardless of the claimant's conduct or the safety of the product. For this reason, the Coalition urges the Committee to return to the approach taken in Staff Working Draft No. 1—essentially a negligence standard—whereby compensation would be required only where a person exercising reasonable care would not have placed the product in commerce. However, as CUPLL suggested last Fall, it is necessary to include with such an approach a clear statement of the circumstances under which it would be inequitable to hold a manufacturer liable. These circumstances include situations where the product bears a conspicuous warning advising of the danger, or where the product is accompanied by a reasonably accessible instructions which, if complied with and supplied to the appropriate person, would have rendered the products safe for use.

In addition, the bill should not provide incentives for product users to act irresponsibly. Therefore, the bill should clearly provide that the manufacturer will not be liable in those cases where the unreasonably dangerous aspect of the product is obvious or resulted from an unauthorized alteration or modification; where the claimant failed to exercise reasonable care; where there was no practical means available to eliminate the unreasonably dangerous aspect of the product; or where the unsafe aspect of the product was an inherent characteristic which would be recognized by the ordinary consumer.

TOXIC HARM

Section 205(d)(1) of the bill provides that where a claimant has been exposed to a product in a manner that would "significantly increase" his risk of toxic harm, the product shall be conclusively presumed to have been the proximate cause of the claimant's harm. For this purpose, an increased risk of 30 percent is deemed "significant." The only mitigating factor is where another toxic agent is more likely to have independently produced claimant's harm. In such instances, a manufacturer of the product would not be held liable.

On its face, the standard of liability for toxic harms is unfair. If the cumulative effect of other causes would have made it likely that such other causes were responsible for the harm, yet none of such other causes singly was more likely, then the manufacturer of the product would still be liable. As a result, section 205(d) would lead to a finding of "causation" even where other agents are more likely than the product to have been responsible for the toxic harm.

S. 1999's reliance upon a statistical assessment of increased risk is made even more unfair when coupled with a 30 percent test of significance. For example, consider a disease which, due to no particular cause, is found in the general population in two persons per thousand. If a particular product causes the disease in three persons out of one thousand, a claimant with the requisite exposure to the product could establish causation in the tort litigation system because it is more likely than not that the claimant contracted the disease from exposure to the product.

By contrast, if another product causes the disease in 0.6 persons per thousand, a claimant would be unable to establish causation in the tort-litigation system because it is not more likely than not that he contracted the disease from that product. In such cases, the disease will have been the result of no particular cause; only in less than 25 percent of the time (i.e., 0.6/2.6) will the particular product have been the cause. Section 205(d), however, will change this result and, in the example given, require the product manufacturer to provide compensation to all persons with the disease who were exposed to the product because the product increased the risk of the disease by 30 percent (i.e. 30% × 2 = 0.6). Thus, in the example, there is more than a 75 percent likelihood that any person entitled to compensation would not have been injured by the product. Such results are simply not acceptable.

Because of these difficulties, the Coalition urges the Committee to consider the recommendation made in connection with Staff Draft No. 1 to limit the toxic harm in provisions to harms incurred in the workplace. The Coalition suggests that such a provision deals with the severest cases and, frankly, those cases for which the political needs are most acute.

Moreover, the Coalition would urge that any revised bill abandon a purely statistical approach in determining causation. Such statistical approaches result in awards on lottery rather than science. S. 1999 should be amended to base its determination upon a finding of reasonable medical probability of causation.

TRIVIAL CLAIMS

As currently drafted—and even as the Coalition would propose amending it—S. 1999 would impose liability upon a manufacturer in many cases where liability would be absent under the tort-litigation system. Indeed, the very premise behind this proposed compensation system is that a claimant will forego the possibility of recovering damages for non-economic harm in exchange for a prompt and speedy recovery of economic losses without litigation.

As part of this trade-off, however, it is appropriate to except from the compensation system those instances of de minimis injury. This will help keep the overall costs of administering and insuring the system at manageable levels. In other words, the compensation system might be thought of as being analogous to an insurance mechanism. Like an insurance policy, it should include a deductible or coinsurance provision—cost control measures suggested, and in some instances insisted upon, by insurers. As CUPLL suggested in its comments on Staff Draft No. 1, a minimum threshold of $500 of unreimbursed expenses would seem appropriate.

FRAUDULENT CLAIMS

S. 1999 currently provides that a claimant who files a claim without good cause may be required to pay all of the manufacturer's cost of investigating and defending the cause. In such cases, the manufacturer would be returned to the status quo. By contrast, where a manufacturer denies liability without good cause or fails to respond in a timely fashion, the court may award the claimant the greater of twice net economic loss or $10,000.

Clearly, the penalty provision of S. 1999 is not fairly balanced. Where a manufacturer acts without good cause, the claimant receives a windfall of twice net economic loss or $10,000, whichever is greater; where the claimant acts without good cause, the manufacturer is returned to the status quo. This is simply not acceptable. The Coalition urges that the penalty provision be amended to provide that where the claimant acts without good cause, the manufacturer be entitled to recover twice the cost of investigating or defending the claims or $10,000, whichever is greater. Such a provision would be more likely to deter fraudulent claims.

CONCLUSION

We agree with the idea of establishing an alternative dispute resolution mechanism as set forth in Title II. Removing the settlement process from the time consuming and expensive tort litigation system will significantly reduce transactional costs and the time required to compensate the wrongfully injured claimant.

In attempting to reach a more efficient claims procedure, however, we should not unleash a system that greater facilitates the filing of frivolous or fraudulent claims thus increasing costs. In many respects, the basis for compensation as set forth in Title II is similar to many other statutory compensation statutes. As we know, some of those statutes have resulted in virtually open-ended liability for industry. For example, in the black lung program, the one time cost of that program was estimated to be $350 million. The actual cost has been almost $2 billion a year. Because of the difficulties of proof, both as to causation and extent of injury, claims of this nature have resulted in a compensation system that is viewed with disdain.

Trading a limited number of multi-million dollar cases for a multitude of smaller but, in the aggregate, even greater claims is not the solution to this serious problem. Rather, the solution lies in reforming the current system in a manner that will provide for prompt and fair settlement of legitimate claims. Essential to such a system is the retention of proximate causation based upon known scientific fact and a determination of liability based upon the relative fault of the parties.

Mr. Chairman, CUPLL appreciates your efforts and those of the other Members of the Committee to help enact a fair and uniform product liability bill. We hope that our suggestions with respect to S. 1999 have been helpful and we stand ready to assist the Committee in its considerations of this legislation.

Thank you.

Senator KASTEN. The next witness is Prof. Teresa Schwartz, no relation to Mr. Victor Schwartz.

Ms. SCHWARTZ. Thank you. I appreciate the opportunity to testify today on S. 1999. I am a professor of law at the George Washington University. I teach and write in the fields of products liability, torts and administrative law, and I am appearing today on my own behalf.

I will focus my remarks on the liability standard and the remedies provided under title II. The purpose of title II is to create a fair and efficient alternative to the tort system that will avoid that system's complexity and high transaction costs. My concern is that the title will itself become a second tort system, with many of the same undesirable characteristics of the current tort system.

The reason for my concern is that title II creates a new and complicated standard of liability that will introduce a great deal of uncertainty and complexity into the system. The liability standard under title II is, in my view, fault based. It falls somewhere on the legal spectrum between negligence and strict liability.

It draws heavily on strict liability doctrines, for example, in defining what constitutes an unreasonably dangerous product and in shifting the burden of proof to the defendant.

On the other hand, it also defines liability in terms of the reasonable care of claimants in using the products that is based on negligence principles.

The standard is, in short, a composite of a number of judicially created standards, some of which are modified under the statute. The result is a comprehensive, multifaceted and untested standard over which there will be, no doubt, many legal disputes. Experience with the tort system has taught us that. The courts have struggled for years and, indeed, are still struggling with strict liability standards that would now become a part of the expedited claims system. The prospects seem good that these same struggles will be transferred to the system under title II.

I am not arguing for a no fault system of liability under title II, with its potentially exorbitant price tag. But I am skeptical that the proposed fault-based liability standard will be clear and simple enough to apply that it will create the fair and expeditious claims procedure desired.

Can it be made simpler? The suggestion was made during the previous panel that the standard might be simplified by eliminating the risk utility test. I have doubts that it would simplify the standard for all cases. The elimination of the risk utility test would leave as the crucial test for liability the fourth factor, that is, whether the risk would be apparent to the reasonably observant person. This is somewhat akin to the consumer expectation test under the Restatement section 402(A).

This has not turned out to be an easy test for the courts to apply. In many cases, especially those involving defective designs, consumers have no particular expectations about risks. Faced with this problem, some courts have said that what consumers expect is what a manufacturer, acting reasonably, would put on the market, thereby making the test akin to a negligent standard. Many courts have rejected consumer expectations as the sole standard of utility.

Further, for the reasons that Professor Owen has pointed out, elimination of the risk utility test also may be undesirable because it would extinguish claims involving products presenting patent but unreasonable risks and allow recovery against makers of beneficial products that pose hidden but unknowable risks.

I would like to say a few words also on the compensation issue. So long as the liability system under title II is based on principles of fault, the compensation limits seem unduly restrictive. The severe limits on compensation in my view exact too great a price from the claimants for the advantages that they gain under title II. Claimants give up all claims for pain and suffering, but the quid pro quo is not a no fault system.

In assessing the fairness of the compensation limits under title II, I believe it is important, and only fair, to take into account the effects on the claimants of the entire statutory scheme, not just the tradeoffs under title II. Claimants not only are made subject to a fault-based standard under title II, but they are giving up strict liability standards in the tort system under title III.

On balance, claimants have lost considerable ground under the statute. This could be rectified to some extent, in my view, if claimants were allowed at least some measure of compensation for pain and suffering under the title II expedited claims procedure.

[The statement follows:]

STATEMENT OF TERESA MORAN SCHWARTZ, PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

My name is Teresa Schwartz. I am a Professor of Law at The George Washington University. I teach and write in the fields of products liability, torts and administrative law. I am appearing today on my own behalf.

I appreciate the opportunity to testify on S.1999, the Product Liability Voluntary Claims and Uniform Standards Act. My testimony will focus on the standards of liability and the remedies provided under Title II, the Expedited Product Liability Claims Procedure.

The apparent aim of Title II is to provide a compensation system for claimants injured by unreasonably dangerous products that is both fair and efficient. Whether it will meet this goal is questionable.

OVERVIEW OF LIABILITY STANDARDS UNDER S.1999

Under S.1999, persons harmed by products may seek recovery for their injuries under one of two alternative systems. They may pursue a civil action against the product manufacturer under Title III, which establishes a negligence standard for liability. Under this option, plaintiff bears the burden of proving that the manufacturer failed to exercise reasonable care in constructing or designing the product or in failing to provide adequate warnings about product risks, and that this failure was the proximate cause of plaintiff's harm. If successful in this action, plaintiff may recover full compensation for injuries, including pain and suffering.

Under the alternative expedited claims system of Title II, a claimant may seek only limited compensation but under liability standards more favorable than the negligence standards of Title III. Compensation is allowed under Section 202 only for "net economic loss," which covers pecuniary losses (primarily loss of earnings and medical expenses) reduced by compensation for these losses from collateral sources. Recovery is not allowed for pain and suffering.

Title II retains a fault based standard of liability. Manufacturers are liable under Title II only for products that are "unreasonably dangerous." However, Section 205(b) creates a presumption that a product is unreasonably dangerous and puts the burden on the manufacturer to show otherwise under a two-part test. The first part of the test involves balancing the product's benefits against its risks and is akin to negligence. It provides that a product is not unreasonably dangerous if the manufacturer shows that "the product's utility so outweighs the risk of the harm caused the claimant that a person knowing of such risk would, nonetheless, in the exercise of reasonable care, be justified in putting the product on the market." The second part of the test is a reasonable expectation test. Under it the manufacturer must show either (1) that the "product risks would have been apparent to a reasonably observant person or would have been a matter of common knowledge to persons in the claimant's situation," or (2) if this cannot be shown, that the manufacturer provided warnings or instructions "adequate to enable a person exercising reasonable care to avoid the risk" or to "make an informed decision whether to assume the risk."

The first part of the test draws heavily on judicial definitions of strict liability in design defect cases. It combines aspects of several common law standards and puts them together in a new way. For example, it draws upon *Barker* v. *Lull Engineering Co.,* 20 Cal.3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978) in shifting the burden of proof to the manufacturer under a risk-utility balancing test. It also draws upon *Phillips* v. *Kimwood Machine Co.,* 269 Or. 485, 525 P.2d 1033 (1974) for the constructive knowledge test that holds the manufacturer to know the risks of its product and then bases liability on whether a reasonable person with that knowledge would have put the product on the market. The second part of the test under Section 205, which is based on reasonable expectations about the product, draws upon (although substantially modifies) the "consumer expectation" test of Section 402A of the Restatement (Second) of Torts (1965).

An exception to the general liability standard of Title II is provided for prescription drugs and devices. Under Section 205(c), such products are not unreasonably dangerous if the manufacturer has taken "reasonable steps" to provide the prescribing practitioner with warnings and instructions that comply with FDA requirements.

THE COMPLEXITY OF THE STANDARD

It was inevitable that the effort under Title II to create a single, fault-based liability standard, applicable to all types of product defects, would produce a multi-faceted and complex standard. Product liability law is far too intricate to yield a comprehensive, yet simple, liability standard. The question, then, is whether the complexity of the proposed standard will undermine Title II's overall aim of providing a fair alternative to the tort system that avoids its complexities and high litigation costs.

While one cannot be sure of the difficulties ahead under the proposed standard, there are reasons to believe that the going will not be smooth. There is no precedent or experience under the standard as drafted. Although it borrows from existing common law standards, it modifies them and combines them for the first time to create a new, untested standard. Thus, one can anticipate that there will be many questions about how its various provisions should be interpreted and applied. If the experience of the common law courts is any guide in this field, these issues may take years to resolve.

Even those parts of the liability standard that are borrowed from judicial decisions have presented intellectual challenges for the courts that devised them. For instance, the *Barker* court has not yet decided how or whether its strict liability test, which it originally formulated for defective design cases, should apply to warning cases. *Finn* v. *G.D. Searle & Co.,* 35 Cal. 3d 691, 200 Cal. Rptr. 870, 677 P.2d 1147 (1984). At least one California appellate court has said it should. *Cavers* v. *Cushman Motor Sales Inc.,* 95 Cal. App. 2d 338, 175 Cal. Rptr. 142 (1979). *Barker* is now eight years old, and the courts are still struggling with its application. This suggests some of the difficulty that may lie ahead with the new standard under Section 205.

Under the *Kimwood* test, which Section 205 seemingly adopts, the manufacturer is presumed to know the harmful characteristics of its products, whether or not they are actually known. This standard also has posed problems of interpretation for the courts. They have experienced some difficulty in defining the scope of the risk the manufacturer is presumed to know. *Newman* v. *Utility Trailer & Equipment Co.*, 278 Or. 395, 564 P.2d 674 (1977). In addition, the time frame for determining knowledge is unclear under the *Kimwood* test. Is the presumed knowledge that which was available at the time of manufacture, or does it include knowledge developed after the time of manufacture but known at the time of trial? Many courts have adopted the former test but others have held manufacturers to know of risks whether or not they are knowable at the time of manufacture. *Beshada* v. *Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2D 539 (1982). It is this latter approach that I believe is intended by Section 205, since it does not provide a time frame for determining knowledge, whereas a time frame (time of manufacture) is provided under the negligence standard of Title III.

Finally the courts have had difficulty, especially in cases of defectively designed products, applying the consumer expectation test, which Section 205(b) adopts in a modified form. One of the problems with this standard is that consumer expectations are difficult to measure. Consumers may have no specific expectation about how a product will perform in a given situation. *Heaton* v. *Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967). Faced with this difficulty, some courts have concluded that what a reasonable consumer expects is a product that a manufacturer, acting reasonably, would put on the market, thus making the standard overlap completely with negligence. See *Welch* v. *Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973).

Some courts have found the consumer expectation test inadequate for another reason: it eliminates claims against products that pose unreasonable but patent risks. A number of courts has rejected consumer expectations as the sole test for design defects. Under *Barker* it is an alternative test, available to plaintiffs when it fits the circumstances; in some jurisdictions consumer expectations are a factor but not determinative. See *Cepeda* v. *Cumberland Engineering Co., Inc.*, 76 N.J. 152, 386 A.2d 816 (1978).

Section 205 does not adopt the consumer expectations test provided in Section 402A of the Restatement ("the ordinary consumer . . . with the ordinary knowledge common to the community"). But it does adopt an expectancy test that seems likely to pose as many problems as the Restatement test, especially when applied in cases of latent design defects.

The complexity of the liability standard does not in itself make the standard a bad one. However, it does raise potentially serious problems for the implementation of the expedited claims system. Clarity and certainty are especially important ingredients in such a system, since parties need to understand the applicable liability standards in order to be able to resolve their disputes promptly. The courts have struggled for years with strict liability standards similar to those contained in Section 205. Indeed, they are still struggling. The prospects seem good that many of these struggles will carry over the claims procedure under Title II.

ANTICIPATED USE OF TITLE II

In light of the complexity of the liability standard under Title II, it is difficult to predict the extent to which the expedited claims system will be used. One can anticipate that a claimant's choice of Title II procedure over a Title III negligence claim will depend in each case on a number of factors, such as: the types of damages suffered, the extent to which collateral sources compensate the losses, and the strength of the negligence claim.

Thus, cases one would expect claimants to bring under Title II would be those involving high economic losses, few collateral sources of payment, minimal amounts of pain and suffering, and doubtful or unavailable negligence claims. Cases claimants would be expected to bring under Title III would be those involving (1) substantial intangible losses, such as the loss of reproductive capacity (especially where that constitutes the major portion of claimant's injury), and (2) clearly negligent conduct by the manufacturer. In between these extremes are a good many cases where a claimant must make a choice on the basis of difficult calculations.

In each individual case, it may be fairly easy to calculate the extent of loss. But for reasons stated above, it may not be as easy to estimate in many cases the relative likelihood of success under the Title II or Title III standards.

Title II does offer claimants one major advantage in every case: it puts the burden of proving that the product is not unreasonably dangerous on the defendant. In addition, claimants may have a negative incentive to use Title II. Their only other option, a negligence claim under Title III, poses difficult problems of proof for plaintiffs.

For certain types of product defects, Title II does offer claimants special advantages over Title III. For example, Title II favors claimants in cases involving flawed or mismanufactured products. To avoid liability in these cases, defendant must establish that the risk was reasonably apparent or that the manufacturer provided an adequate warning about it. Since this will be virtually impossible to prove (flawed products meet neither consumer nor manufacturer expectations, nor do they carry warnings about their defectiveness), claimant should recover easily in these cases. In contrast, a Title III negligence claim involving a flawed product may present serious problems of proof for plaintiff. Under Title III, Section 302(b), defendant can avoid liability for flawed products by proving (by clear and convincing evidence) that it exercised reasonable care in the construction of the product. If defendant raises this defense, plaintiff must refute such claims by demonstrating negligence in the manufacturing process—a burden long recognized as onerous for plaintiffs. Despite these difficulties, however, claimants may not choose to bring every flawed product case under Title II. If plaintiff's injury has caused great pain and suffering, she might opt to bring a Title III negligene claim in the hopes she can refute any defense of due care raised by the defendant and recover full compensation for her injuries.

Another potentially large category of cases that claimants might bring under Title II are those involving design defects that are not obvious to users, e.g., claims about the structural integrity of vehicles, or the strength of protective devices, etc. These kinds of design defects, which are most often the types challenged in crashworthiness cases, are seldom apparent to consumers, nor are they the subject of manufacturers' warnings. See *Turner* v. *General Motors Corp.*, 514 S.W.2d. 497 (Tex. Ct. Civ. App. 1978). Therefore, defendants may be unable to demonstrate, as required in each case under Section 205, that the risk of harm was "apparent to a reasonably observant person or a matter of common knowledge."

Some claims will only be viable under the expedited claims procedures of Title II. Cases of injury from toxic substances, for example, where the claimant cannot identify the manufacturer who caused his injury, can only be brought under Title II. On the other hand, some cases—for example, those involving prescription drugs and devices—will fall almost completely outside Title II. Such cases most often involve claims that warnings are inadequate, despite their compliance with FDA requirements. See *Feldman* v. *Lederle Laboratories,* 97 N.J. 429, 479 A.2d 374 (1984). Since Title II makes compliance with FDA requirements a complete defense, these cases can be brought, if at all, only under Title III.

Other cases involving claims of inadequate warnings (outside the drug field) also may be brought more frequently under Title III. The standards of liability for warnings under both Titles, while not identical, may be sufficiently similar (negligence based) that plaintiffs in these cases will pursue Title III claims and the promise of full compensation for their injuries.

In sum, while a claimant's use of Title II will depend largely on the particular mix of circumstances in each case, some rough estimations may be possible about the kinds of cases claimants will and will not bring under Title II. The most favorable cases for claimants would seem to be those involving mismanufactured products, latent design defects and toxic substances. The most unfavorable cases for claimants would seem to be those involving prescription drugs and devices. Somewhere in the middle are cases involving inadequate product warnings (excluding drug and device cases) and cases involving patent design defects. In these cases, a claimant's choice may turn largely on the nature and size of the damage claim.

PROSPECTS FOR SETTLEMENTS

Obviously some cases brought under Title II will lend themselves to expeditious settlement. Cases that involve clear cut liability (e.g., flawed product cases) and small damage claims are obvious candidates. Even cases of doubtful merit may lead to settlement if the damages are low, since defendant's cost of proving non-liability may outweigh the cost of settlement. In addition, the costs and penalty provisions of Sections 208(b) and (c) can be expected to provide some incentive for settlement.

Cases that may end in litigation under Section 208 are those involving questionable liability and large economic losses. Given the complexity of the liability standard, as discussed above, there may be a large percentage of such cases in which liability is uncertain. If these cases, in general, litigated under Section 208, the system is unlikely to serve as an efficient alternative to the tort system.

FAIRNESS OF THE COMPENSATION STANDARD

The liability standard under Title II is far from a no-fault standard. In a number of respects it is closer to a negligence standard than it is to existing strict liability standards in many jurisdictions.

The Title II liability standard is largely based on the reasonableness of the manufacturer's conduct. Contributory negligence, to the extent it constitutes "gross failure" to exercise reasonable care by the claimant, bars his claim. Warnings are adequate if they enable a person "exercising reasonable care" to avoid the risk.

Although defendants bear the burden of proof under Title II, ultimately claimants must be able to refute the evidence presented. When it comes time to do so, other provisions of the statute make it difficult for claimants to prove their claims. For example, Section 108 requires that expert opinion be supported by peer-reviewed scientific or medical studies, and Section 109 puts limits on the use of evidence of post-sale remedial measures.

Title II thus eliminates many advantages plaintiffs have under existing strict liability standards. For example, under strict liability, similar limits are not imposed on the use of experts; often evidence of post-sale remedial measures is permitted. In addition, many jurisdictions distinguish strict liability from negligence by emphasizing the safety of the product rather than the reasonableness of the manufacturer's conduct. See *Barker,* supra; Cepeda, supra; *Azzarello* v. *Black Bros. Co.,* 480 Pa. 547, 391 A.2d 1020 (1978). This distinction is not made under Title II.

Further, under strict liability, contributory negligence is either no defense, *Bailey* v. *V.O. Press Co., Inc.,* 770 F.2d 601 (6th Cir. 1985), or is not a complete defense, *Daly* v. *General Motors Corp.,* 20 Cal. 3d 725, 144 Cal Rptr. 380, 575 P.2d 1162 (1978). Under Title II, gross negligence completely bars recovery. Also, under strict liability the scope of the duty to warn is very broad, and includes the duty to warn about foreseeable misuse. *Moran* v. *Faberge, Inc.,* 273 Md. 538, 332 A.2d 11 (1975). Under Title II, the duty to warn is narrower; a warning is adequate if it enables "a person exercising reasonable care to avoid the risk."

The fundamental question, then, is whether under the fault-based liability standard of Title II, claimants should be able to recover only "net economic loss" as defined by the statute. The limited compensation under Title II works a real hardship in cases where injuries do not result in pecuniary loss but involve substantial injury nonetheless (the loss of reproductive capacity is a striking example).

The trade-offs sought under Title II are not the same as those made under worker compensation systems, where claimants have given up their claims for pain and suffering but have gained in return a no fault system. Here there is not the same guid pro quo. Claimants are being asked to give up their claims for pain and suffering but they do not get a no-fault system in return.

It may not be economically feasible to have a no-fault system for injury producing products. If so, and defendant's fault remains an important factor in determining liability, this should be taken into account in setting the compensation limits. On its face it seems unfair to have a fault-based liability system in which no-fault compensation limits are applied.

In assessing the fairness of the compensation under Title II, it is important to take into account not only the trade-offs under Title II but the effects on claimants of the entire statutory scheme. When the question of fairness is examined from this perspective, it becomes more apparent that the limits on damages under Title II are inequitable. For under the statute, not only do claimants remain subjec to a fault based liability standard under Title II; they also give up strict liability standards for their tort claims under Title III. On balance, claimants have lost considerable ground under the statute. This could be rectified to some extent by permitting claimants to recover at least some measure of compensation for pain and suffering under Title II.

CONCLUSION

In sum, I am skeptical that the provisions of Title II will create a fair and expeditious alternative to the tort system. A major problem with the scheme is the complexity of the liability standard which, in my view, will create uncertainty and spawn frequent litigation, as it has in the tort system. As long as the claims system is fault based (the liability standard under Title II falls somewhere on the legal spectrum between negligence and strict liability), it is almost inevitable that it will also be a complicated system. Indeed, I doubt that it is possible to draft a fault based liability standard that can both comprehensively cover this complex field and at the same time be simple and easy to apply. Hence I remain skeptical that the proposed system will be efficient and avoid the high transaction costs of the tort system.

Senator **Kasten**. Our next witness is Mr. Leslie Cheek, Crum & Forster Insurance Co's.

Mr. Cheek.

Mr. **Cheek**. Thank you, Mr. Chairman.

The companies I represent are the second largest writers of general liability insurance, which typically includes the product liability exposure, and we are pleased to have this opportunity to comment on the standard of liability and the measure of damages proposed in title II of S. 1999.

As we understand the objectives of the title II procedure, they are first to reduce the transaction costs associated with compensating persons injured by defective products; second, to provide speedier compensation to these persons; and, third, to be fair to claimants and product manufacturers alike.

While, as Victor observed, these objectives are straightforward and laudable, the achievement of the third goal, fairness, may threaten achievement of the first two. The more safeguards and procedural protections incorporated into the standard of liability under title II, the more it begins to resemble the standard of liability under title III, with the costs and delays inherent in evaluating the relevant contributions of both claimant and manufacturer to the claimant's harm.

Indeed, the title II standard of liability in the predecessor to S. 1999 imported the tort law notion of the defectiveness of a product, design, or warning in its use of the term "unreasonably dangerous" as the predicate for a manufacturer's liability. And it also adopted the traditional reasonable care standard for evaluating whether a product is unreasonably dangerous. That standard's focus, as it is in tort law, was largely on the conduct of the manufacturer, and its test of the reasonableness of that conduct was largely objective: If he had known that the product was unreasonably dangerous, would the manufacturer have placed it in the stream of commerce?

The title II standard of liability in S. 1999, on the other hand, while still retaining the unreasonably dangerous test for the product itself, adopts an ill-defined risk versus utility analysis that essentially pits the objective characteristics of the product against the subjective interests of the claimant, and would thus require compensation even if the manufacturer's conduct was beyond reproach and even if the claimant himself was negligent.

Moreover, the liability standard places the burden on the manufacturer to show that his product was not unreasonably dangerous, notwithstanding the general impossibility of proving a negative.

With the clarity that 20/20 hindsight always provides, the standard also imputes knowledge to a manufacturer that he may not have had at the time he made a product which later proves harmful, thereby creating the possibility of open-ended retroactive liability.

We, as well as others on this panel, would recommend returning to the standard of liability proposed in staff working draft No. 1, while retaining the improvements made in section 205(c) with respect to drugs, and adding similar protections for manufacturers who comply with governmentally mandated warning or labeling requirements.

Frankly, we are not optimistic that a standard of liability can be framed for title II that will meet all of its objectives to the satisfaction of the diverse interests involved in the legislative process. Indeed, to the extent that a balanced title II trigger would resemble tests for liability under title III, it might be worthwhile to explore, as Mr. Kimmelman suggested, an alternative to title II that would create incentives for both claimants and manufacturers to settle their differences on the basis of title II's measures of damages, but without reference to a particular standard of legal liability.

Finally, with respect to the measure of damages under title II, we strongly support the net economic loss concept and its limitation to actual out-of-pocket costs. It seems to us that three factors argue strongly for the recognition of collateral sources of compensation in the title II context.

1. As Victor noted, the original predicate for not recognizing these sources—that a wrongdoer should not profit from a plaintiff's providence—would make little sense in a system which will impose liability even in the absence of wrongful conduct.

2. The availability of health and disability income insurance and worker's compensation benefits in our society is so pervasive as to make it ludicrous to pretend that these resources do not exist.

3. As other witnesses have suggested, insurance of all kinds is becoming so expensive that we can no longer afford to waste our limited resources in duplicative—or even multiplicative—compensation for the same harm.

Thank you again for this opportunity to testify before you.

Senator KASTEN. Mr. Cheek, thank you, and I would like to thank the entire panel for the work that many of you have done, or most of you have done in terms of working with the staff as we try to wrestle through some of these different difficult definitions and concepts.

Senator Danforth, do you have any questions?

The CHAIRMAN. Yes, I do, Mr. Chairman.

Why would the following be unworkable? Why would it be unworkable to drop the risk utility test on the basis that it is too complex and too subjective and keep the rest of it?

I do not understand why it is complicated, nor do I understand why it has anything to do with fault.

Professor Schwartz, if you simply provided that you have got the claim system recovery, if you proved that you were injured by the product that was the proximate cause and that you were using it in the anticipated way, unless the manufacturer came back and proved that you either knew better or you should have known better, you should have known that there was a risk, it would seem to me that that is very workable. And why wouldn't it be workable? And could we make it workable?

Mr. SCHWARTZ. Well, we looked at that. There are certain products which, when they are used in their intended way, such as pharmaceuticals, can cause many, many risks and if the pharmaceutical industry had to pay for all of those risks it is unlikely that it would be affordable. The same may be true of other products.

There are many injuries that can just occur in the course of using a product that really do not deal with anything that is defective or wrong with that product.

For example, the law has always said that manufacturers are not ever liable for inherent characteristics in their products, such as scissors cutting or somebody being burned on a stove.

The **CHAIRMAN**. That, of course, in my view would be covered by the defense. In other words, you say this caused the injury and I was using it for the intended purpose. But why would scissors not create liability? The reason is that it is obvious scissors are sharp. It is apparent, just by looking at the scissors.

Mr. **SCHWARTZ**. Well, there would have to be a judgment made as to what is obvious and what is not, and maybe the scissors is an example where everybody would agree it was an obvious danger. But with some of the other words used—and we have tried to strike on page 28, strike lines 1 through 6, we found that one is still left with the murky issue as to what is defective. And those words that were used could lead to disputes in many, many cases that you and I this morning will or have not thought of.

The **CHAIRMAN**. Why isn't it a much simpler method in the standard tort system? If the defendant wants to litigate it, fine. Or if the plaintiff wants to litigate it, fine.

Mr. **SCHWARTZ**. I do not think the members of the Product Liability Alliance would want to absorb the cost of a risk that is totally unknowable at the time they made the product. I do not think that pharmaceutical companies should bear the cost of all side effects that can occur with the use of drugs or other products.

We must face the fact that there are many society risks that should not go under either title I or title II. This risks should be borne by society as a whole, not by an individual manufacturer.

The **CHAIRMAN**. Let me just ask you—and I would be delighted to hear any comments on whether we should do this—but is it workable? Is it relatively simple or could it be? Maybe there are some drafting problems. But could it be a simple system to provide that you had, that you could use the claims system with limited recovery, provided you showed (a) causation, (b) intended use, and the manufacturer did not show that you either knew because there was a warning or should have known because it was common knowledge that these accidents happen?

Mr. **SCHWARTZ**. Well, this would open the door for absorbing risks that are totally unknowable.

The **CHAIRMAN**. But would it be simple? I mean it would not be complicated or it would not lead to just piles of litigation.

Mr. **SCHWARTZ**. Well, I think the disputes as to whether, when you get into what a person actually knew or should have known, that is a litigable issue. What you put forward is simpler than what it is here. And we in our testimony say that we are quite willing to work with you toward trying to develop language that would be efficient, effective and fair.

One cannot draft in an open room, but I think the direction toward eliminating words that are nondescriptive words, words that everyone could have a different view of as to what they mean, is the process by which we should proceed.

The **CHAIRMAN**. Thank you, Mr. Chairman.

Let me say this. You do not exactly leave the hearing room with a spring in your step to hear, I would say except for Professor Owen, uniformly negative comments from the witnesses. But it seems to me that the process is worth pursuing.

First of all, I totally, I just absolutely do not accept the fact that the status quo is the only thing that is predictable and good. Second, it seems to me that if we are going to develop something, it has to be a combination of a claims system and tort reform.

We have tried each of the others separately, and there are not the votes there, so forget it. It is going to be a combination or there is not going to be anything.

Third, I really think that therefore it is worth trying to put together some package. Now, my view is that yes, it should be simple. Does this mean that therefore it also has to be perfect? Does it mean that you have to think of a system that there is no conceivable problem with?

My answer to that is no. I mean you are never going to develop a perfect system for handling product liability cases. There are always going to be cases where you can say oh, how about the swimming pool in the backyard. If that is something that the manufacturer should have put the gate on, I do not know, but it is never going to be a perfect system.

I think that it is always going to be possible for endless panels of law professors to come here and say oh, gee, well we just can't have this.

But I would really urge you to take a constructive view, a positive view of what we are about. I cannot imagine anything more important for this committee to do than to put together a package that we can get enough votes to pass, and that is going to be hard. It is going to be hard. But I really would think that a simple claims systems—simple—is the goal, plus the kind of tort reform that is in title III of this bill.

So please do not abandon the ship yet.

Mr. SCHWARTZ. Well, I don't know about a spring in one's step, but maybe a slight lift. Those are our exact goals, and our membership wants to continue to work with you and your counsel, and I think we are much further down the path than we were last May.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. Thank you. I would address this to any volunteer on the panel. You have heard me express some concern over the joint and several liability issues mentioned here.

Would each of you comment on the differences between the comparative responsibility approach in S. 1999 and the total elimination of joint and several liability in the products liability area, and give your opinion which you would prefer or whether you would advise on some alternative approach?

Mr. KIMMELMAN. I would just say, Senator Pressler, that we think elimination of joint and several liability would be radical surgery, and our concern would be this: Particularly in the context of trying to establish a compensation system and deal with the tort system, we would like to see something that provides not perfection, but great confidence that compensation really works and that people would get adequate benefits for injuries caused by dangerous products.

It seems to us that it would be dangerous to fiddle with too many aspects of the tort system until we are certain that we have adequate compensation up front, if that is meant to catch people who have difficulty recovering. And I do not believe that joint and several liability is even used that often in the tort system today.

If you have a compensation that deals with those people who have difficulty recovering today, and those are the people who need to use joint and several liability, then you may be able to turn to that issue. But I do not think we are at that point yet.

Mr. SCHWARTZ. I would say that with regard to many of our members, our feeling is that joint and several liability can produce very arbitrary results. Somebody who is 1 percent responsible for harm has to absorb 100 percent of the cost, but thus far that topic has not been deemed to be added to Title III. Back in earlier bills, it was felt that addressing the joint and several liability issues would create differences, between business and consumer groups. But logically, it is hard to understand why somebody who is 1 or 2 percent at fault should absorb 100 percent of the risks.

Senator PRESSLER. Mr. Kimmelman, you said it was not used very often. Joint and several liability is not used very often.

Mr. KIMMELMAN. We always have this problem with data on joint and several. We have no information showing that anyone can, legally, go into court under joint and several liability and get somebody who is 1 percent at fault to pay the entire claim. There are no cases which fit that pattern at all.

Mr. CHEEK. Senator, with all due respect to Mr. Kimmelman, there are 36 States that currently have a joint and several liability rule; beyond that at least two courts have held that the Federal Superfund statute requires the imposition of joint and several liability.

If I had to pick one tort reform that would do most to improve the availability and affordability of liability insurance in this country, it would be the abolition of joint and several liability.

Senator PRESSLER. You would do that, how? By eliminating it?

Mr. CHEEK. Absolutely. Alternatively, legislation could be enacted to establish a system of pure several liability, in which if you could demonstrate a proportional contribution to the harm, your liability would be limited to that proportion of the ensuing damages.

Senator PRESSLER. Now, what do you think of the approach in this bill?

Mr. CHEEK. To my knowledge, Senator, this bill does not treat the issue of joint and several liability.

Senator PRESSLER. We are thinking of an amendment in that area. What would you advise? You would advise going to a system of strict several liability?

Mr. CHEEK. Yes, sir.

Senator PRESSLER. If you are 2 percent liable, you would pay 2 percent of the damages.

Mr. CHEEK. Two percent of the damages. If you do not have that, then it becomes impossible for an insurance underwriter who is evaluating a particular insurance risk to estimate that business risk's exposure to loss.

Senator **Pressler**. That is right, because a court or jury might find you 1 percent at fault and you would be liable for 100 percent of the damages.

Mr. **Cheek**. And you would have to pay damages that would bear no proportion to that contribution.

Mr. **Lyons**. I would echo those comments from the manufacturer's point of view. We have been in cases where, in my estimate, we have been no more than 5 percent liable as a raw materials or component part manufacturer. When these cases are filed in States that do not allow third party actions against the employer who put his employees at risk because of various practices in the workplace, the employee being unable to sue the employer, sues the manufacturers. The manufacturers cannot join the employer in the lawsuit and under these circumstances we have paid over a million dollars in settlement in at least one case where we had very little liability, but under the joint and several law as it is applied and as it is now in the act, we would have that obligation.

The act, as it is currently drafted, when applied to a raw materials supplier, especially in the chemicals area, who is supplying a downstream user of those chemicals in an industrial setting will place a tremendous risk on the supplier because of joint and several liability.

The manufacturer of the raw materials can pass on all the warnings and instructions that he cares to and if those are not passed on to the employees, and those employees act irresponsibly as a result of it, and as a result the workplace is a virtual nightmare, that manufacturer will have virtually full responsibility for the toxic harm suffered by those employees under the act.

I think a revision of that would be very much needed and would offset some of the deficiencies in the duty to warn and instruct provisions in the act.

Senator **Pressler**. I would like to say to my colleagues, Senators Kasten and Danforth, that I am going to support the bill, that I am going to be sending you around an amendment that I have, and I hope you will consider it in this area and I hope we can find a compromise area because I think this is a major difficulty as far as I am concerned.

We need to improve the bill if we can. It would not be a killer amendment. I will be talking to you about it.

Senator **Kasten**. In S. 100 we worked out this whole issue of comparative responsibility and you would be responsible for the percentage that would be attributable to you, and I think that is the direction in general that you seem to be pursuing now and it is possible that the final legislation would incorporate.

Senator **Pressler**. I have no more questions.

Senator **Kasten**. I would like to thank all the members of this panel.

Our next panel will include Mr. Wainwright, Mr. Popper, Ms. Gilbert and Ms. Mahshigian.

[Pause.]

Senator **Kasten**. The committee will come to order.

This panel will look at the litigation standards of title III of the bill, which incidentally incorporates a number of the elements of S. 100.

The first member of this panel is Mr. Kenneth Wainwright, Litigation Counsel, Allied-Signal.

Mr. Wainwright.

STATEMENTS OF J. KENNETH WAINWRIGHT, JR., LITIGATION COUNSEL, ALLIED-SIGNAL, INC.; ANDREW F. POPPER, THE AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW; PAMELA GILBERT, STAFF ATTORNEY, U.S. PUBLIC INTEREST RESEARCH GROUP; AND LIBERTY MAHSHIGIAN, CO-COUNSEL TO THE PRODUCT LIABILITY ALLIANCE

Mr. WAINWRIGHT. Thank you, Mr. Chairman, members of the committee. I would like to begin by thanking you, Mr. Chairman, and also Senator Danforth for your continued interest in the subject of product liability reform and for your demonstrated interest by holding these hearings.

I would like to, in the brief time that is allotted to me, comment on three or four matters in title III where I think some additional work is needed. I want to emphasize, however, that we are in fundamental agreement with the concept that title III represents.

Title III is a reasonable proposal. It is not a radical proposal; rather, I think it is a middle ground. It is not back to the future, but rather back to the basics.

I think the chief benefits to be gained from title III are uniformity, predictability, and a return to standards of liability that are based on actual culpability, rather than theories of liability which are based upon a defendant's status as a manufacturer or, even more perniciously, his ability to pay, which in the parlance of the courts today is known as loss shifting.

Allied-Signal is no stranger to the product liability crisis. We have some 1,500 litigated matters pending at this time. Of that, 1,200 or 80 percent of our caseload is what could be characterized as product liability claims.

Our insurance premiums are reaching stratospheric proportions. This year alone, our aircraft product liability premium will be $43 million. Our nonaircraft product liability premium has yet to be determined for 1986, but last year it was some $21.1 million.

Although we are more fortunate than smaller companies in that we have been able to retain the desired limits of coverage that we seek, we have done so at a tremendous cost as our retention or deductible has risen, until it now stands at some $937,500 per occurrence. Even though we have annual sales of $11 billion, that is a staggering number. What it means is that in all but the most serious cases, the corporation is effectively self-insured.

We endorse title III. We have some reservations about title II. I have communicated those reservations to the staff in detailed comments. I am not, as some witnesses have appeared to indicate here today before me, ready to throw out the baby with the bathwater. I think perhaps we can change the bathwater in title II and come up with a workable proposal that will satisfy all interests.

As far as title III itself is concerned, I would like to briefly touch upon three or four areas where I think some reforms, some additional provisions are needed.

First, in section 302, a defense should be added which specifically recognizes the state of the art. The state of the art is that legal concept which says that if a risk is scientifically unknowable at the time a product is manufactured, the manufacturer will not be responsible for subsequent injury which occurs when, 30 years later, that risk is finally discovered.

The fundamental concept of title III is a return to fault-based standards of liability. State of the art is a well-recognized defense today under the present system and, I submit, entirely consistent with title III's fault-based liability standards.

If a risk is unknowable, a manufacturer cannot be negligent if he does not know about it.

I would also point out that the European Economic Community in their product liability directive which was passed in July of last year, specifically adopted state of the art as a recognized defense. The European Community in one sense is a Johnny-come-lately to the question of product liability, but certainly our standards should be no less than theirs.

The next area that I would like to turn to is section 307 in the bill, and this will tie in with some of the comments that were made in the last panel discussion. As drafted, the bill contemplates that comparative responsibility will be left to State law. I think that is a major mistake. The primary goal of this legislation is State-to-State uniformity. Comparative responsibility is that legal doctrine which says that the plaintiff's conduct, if he contributed to cause the accident, should be applied to reduce his recoverable damages.

Many irrational rules exist at the State level on the subject of comparative responsibility and I would like to take 30 seconds to illustrate. Let's assume that we have a plaintiff who sues two defendants. The plaintiff is found 51 percent liable. Defendant one is found 20 percent liable; defendant two, 29 percent liable. Depending on what State you are in, the outcome of that case can go any one of three ways.

If you are in a pure comparative negligence jurisdiction, the plaintiff would recover 49 percent of his damages. His 51 percent of fault would serve to reduce his recovery to a level of 49 percent.

If you are in what is called a limited comparative negligence jurisdiction, the plaintiff would take nothing because he was more than 50 percent responsible for the accident.

If you are in New Jersey, the plaintiff would recover 100 percent because his comparative responsibility cannot be considered in a strict liability action.

I submit that these are two of the crucial aspects of the bill that have to be looked at.

The subject of contribution is another matter for some serious concern.

I thank you for asking me to appear here today and I support your efforts, particularly as they relate to title III.

Thank you.

[The statement follows:]

STATEMENT OF J. KENNETH WAINWRIGHT, JR., LITIGATION COUNSEL, ALLIED-SIGNAL INC.

I appreciate this opportunity to appear before the Committee to discuss Title III of S. 1999, "The Product Liability Voluntary Claims and Uniform Standards Act." I am Litigation Counsel for Allied-Signal Inc., a corporation formed as the result of the merger of Allied Corporation and The Signal Companies, Inc. Today, with $11 billion in annual sales and 140,000 employees, Allied-Signal is a leader in the aerospace, automotive, engineered materials, and electronics industries.

Public attention is now focused on the "liability insurance crisis." Although more fortunate than many smaller companies, Allied-Signal is no stranger to that crisis. Presently, the corporation is a party in approximately 1,500 litigated matters, of which 80% (or roughly 1,200 cases) are classified as "product liability" claims. Our product liability insurance premiums have increased dramatically. Aircraft product liability premiums have risen from $8.2 million in 1984 to $18.5 million in 1985 and $43 million in 1986. Non-aircraft product liability premiums have risen from $16.2 million in 1984 to $21.1 million in 1985. The 1986 premium has yet to be determined. Although we have been able to maintain coverage at desired limits, our retention has risen steadily until it now stands at $937,500 per occurrence. In all but the most serious cases, therefore, the corporation is effectively "self-insured."

Although we have serious concerns about Title II in its present form—and have submitted detailed comments to the Staff in that regard—we believe that Title III is a postive response to the product liability problem. The chief benefits of Title III are national uniformity and an emphasis on the fundamentally sound concepts of individual responsibility and liability based on proof of fault and causation. These overall goals can be enhanced by the following specific modifications:

SECTION 301

Currently, the bill allows a claimant, upon the denial of a Title II claim, to either proceed with the remedies outlined in Section 208 or file a civil action under Title III. The current arrangement can lead to increased transaction costs or "legal gamesmanship." For example, if a claimant "opts-out" of Title II, the manufacturer will face increased transaction costs because it would then have to establish facts already presented in the claim application by means of formal discovery procedures in Title III litigation. Alternatively, some manufacturers might choose to deny all title II claims in the hope that most claimants will elect Title III procedures rather than Title II procedures. The only way to avoid these problems is to grant claimants the right to elect to pursue either a Title II remedy or a Title III remedy, but to make that election a binding one. In other words, the remedies provided by Titles II and III should be mutually exclusive.

SECTION 302

Subsection 302 (e)(2), dealing with post-manufacture warnings, should be amended so that a manufacturer who fails to provide post-manufacture warnings is negligent "unless the warnings or instructions, if given, would not have materially affected the conduct of the product user." A finding of liability for failure to warn, absent proof of causation is inconsistent with the standards of Title III.

A new subsection should be added to deal with the case of products that a manufacturer no longer makes. In such circumstances, a failure to warn or instruct should not be negligent unless the manufacturer knew, or had actual knowledge of facts from which he should have known, about a danger posed by the product. Absent this modification, manufacturers would be forced to "follow" a product forever, even though no one currently within their employ is familiar with its design or construction.

We also believe that the bill should specifically provide that warnings need not be given about: (1) dangers which are obvious, (2) the consequences of unforeseeable misuse, or (3) the consequences of product alterations or modification. Such provisions are consistent with current law and in line with fault-based liability standards.

Subsection 302(h), at first reading, appears to grant manufacturers a "compliance with governmental standards" defense. Upon close analysis, however, this subsection is of little benefit since a manufacturer can be held liable even though he has fully complied with governmental standards if a claimant establishes that a reasonable person "could and would have taken additional precautions." That exception eviscerates subsection (h) and is fundamentally unfair. It allows claimants and juries to retroactively "second guess" federal standards and specifications which a manufacturer is nevertheless legally bound to meet as an initial matter. Either governmental standards and specifications mean something—and a manufacturer's compliance with them should be a defense—or such standards and specifications are meaningles. Although one might argue that "standards" only establish minimum design criteria, the same conclusion is not true for "specifications" which establish acutal design criteria that must be met in order to satisfy contractual requirements. Therefore, we recommend the existing subsection (h) be modificed to provide a realistic defense.

Subsection 302(i) grants a defense to manufacturers of aerospace or defense products if such products comply with governmental specifications, unless the claimant proves by a preponderance of the evidence that the manufacturer withheld information concerning the product from the federal government. We believe that a claimant's burden of proof should be raised from a mere preponderance of the evidence to proof by "clear and convincing" evidence. In effect, the subsection denies a defense to the manufacturer only in cases where the manufacturer's conduct amounts to a "fraud upon the government." Under the better view, allegations of fruad must be proven by "clear and convincing" evidence, and this subsection should be amended to reflect that burden of proof.

Finally, we recommend that Section 302 be modified to specifically recognize "state of the art" and "unavoidably unsafe product" defenses. Both defenses are recognized by the Restatement of Torts, Second, and are consistent with Title III's overall approach that manufacturers should only be liable in the event that they are negligent. If a risk is unknowable, than a manufacturer cannot be negligent if he does not know about it. Similarly, if a product is unavoidably unsafe, but nevertheless useful and desirable, a manufacturer should not be held negligent merely because he is incapable of doing the impossible. The Committee should also note that the "Product Liability Directive" adopted by the Council of the European Communities on July 25, 1985 specifically recognizes "state of the art" as a defense in product litigation. See, Council Directive 85/374; Article 7(e).

SECTION 303

This Section establishes standards of liability for product sellers. Subsection (b)(1) deals with a seller's liability for failure to pass along product warnings. In that regard, the word "adequate" should be omitted from page 53, line 3. A product seller's liability for failure to pass along warnings provided by the manufacturer should depend upon whether or not the seller communicated those warnings to his customer, and should not be complicated by an additional argument about whether or not the seller thought such warnings were "adequate" or "inadequate." If the warnings are inadequate, liability should properly rest with the manufacturer.

SECTION 304

This section deals with the offset of worker's compensation benefits. The phrase "the judgment entered against each defendant and third-party defendant found liable shall be reduced by the sum of the amount paid as workers' compensation benefits" appearing in subsection (a) [at page 54, lines 17–19] should be changed to read "a judgment for the claimant shall be reduced by the sum of the amount paid as workers' compensation benefits . . ." As a practical matter only one judgment will be entered and it will usually include several defendants. As presently drafted, one could misconstrue the statute and argue that the amount of workers' compensation benefits should be deducted from each defendant's share of any judgment. This would lead to multiple counting of the compensation award and, potentially, could reduce a claimant's award below zero. The suggested revision will insure that the judgment is reduced only once by the gross amount of the workers' compensation award.

In subsection (b), the words "trial, but not discovery in" should be inserted immediately before the words "the action" appearing on page 55, line 4. There is good reason to stay trial of a civil action until such time as the final amount of compensation benefits has been determined. However, there is no reason to stay discovery in a civil action until the amount of compensation benefits has been determined. As drafted, this section potentially is subject to abuse by claimants' attorneys. Such attorneys could file a civil action and immediately move for a stay of the case until the worker's compensation award has been determined. Then, two or three years later, after workers' compensation was awarded, they would apply for a "short notice" trial date, arguing that the case has already been "on hold" for two or three years. A trial judge might be inclined to grant such a motion in hopes that it will increase settlement pressures on the defendant, thereby removing one more case from his docket. In order to insure that defendants are adequately prepared, discovery should not be stayed in civil actions while a worker's compensation claim is being adjudicated.

Subsections 304(c) and 304(d) should be harmonized to preserve the right of manufacturers, as well as employers and compensation carriers, to enforce express contracts of indemnification. Frequently, employers, for their own purposes, will ask manufacturers to build a machine in a certain way or to eliminate otherwise available guards or safety devices. In such cases, it is not uncommon for manufacturers to demand and receive indemnification from the employer. Such valuable contractual rights should not be abrogated by statute, particularly where they are the result of arms-length negotiation between the contracting parties.

Subsection (f), which makes Section 304 inapplicable to any person subject to or covered by the Longshoremen and Harbor Workmens' Compensation Act, should be eliminated. As its title suggests, Section 304 is intended to provide uniformity in the way worker's compensation offsets will be handled under Title III. Since uniformity and a reduction of transactional costs are among the fundamental purposes of this legislation, there is no justification for subsection (f)'s exclusion of the Longshoremen's and Harbor Worker's Act. Employers covered by that act are as much in need of protection against product claims as is any other employer.

SECTION 305

Subsection (b) should be modified to clarify that the trier of fact is only to consider the possibility of punitive damages in a case where the claimant: (1) has asked for a punitive award as an initial matter, and (2) the trier of fact has first determined that a compensatory award is appropriate. As presently drafted, the bill makes consideration of punitive damages an "automatic" issue in every case—hardly a reasonable legislative intention.

SECTION 306

This Section provides statutes of limitation and repose. We recommend that the words "which is a capital good" be omitted from subsection (b) so that the period of repose would apply to all products. A lack of uniformity in statutes of repose at the state level is a significant factor in the ever-escalating number of product liability claims. Relief from so-called "long tail" liability is sorely needed.

We also recommend that the 25-year period be shortened to some lesser period such as 10 years. As drafted, the bill misses the mark. It grants a limitation in the case of capital goods (which because of their longer useful lives are more durably constructed), but provides no relief in the case of non-durable goods which were never intended to function for two and one half decades. Most products have useful lives of 10 years or less. A product which has been operated for 10 years is either "worn out" or has already proven the propriety of its original design and construction. In either event, a shorter period of repose seems reasonable.

Finally, we recommend that a new subsection be added to Section 306 to provide a statute of repose in "toxic harm" cases. If such risks are to be insurable at all, or insurable at reasonable rates, then there must be some liberal, yet realistic limit to this unkown and potentially unquantifiable liability. We suggest that the limitation in such cases be 25 years from the date of the claimant's last exposure to the product which is alleged to have caused the toxic harm.

SECTION 307

As drafted, this section contemplates that the subject of "comparative responsibility" will be governed by state law. Since a claimant's comparative responsibility is (or should be) a major issue in virtually every product liability action, we believe this crucial subject should be addressed by the legislation if it is to achieve its primary purpose of state-to-state uniformity. Many irrational rules have developed at the state level on the subject of comparative responsibility. For example, in New Jersey, a plaintiff operating an industrial machine is considered legally incapable of contributory fault. Yet that same plaintiff, if involved in an automobile accident on his way to work, can be charged with comparative fault.

Another significant problem with the bill is the absence of a provision addressing the subject of contribution in civil actions under Title III. Although the bill goes to great lengths to adjust the rights of a claimant vis-a-vis an individual manufacturer or product seller, it does nothing to adjust the rights of multiple defendants among themselves. Because most product liability claims involve multiple defendants, it is believed that a contribution provision should be added to the legislation to fully achieve its primary goal of state-to-state uniformity of result. Absent a uniform contribution provision, the parties in a particular case would be remitted to widely differing state law provisions on contribution, ranging from no contribution at common law to full equitable contribution in many states. In short, the existing situation with respect to contribution is no more uniform and, in many cases, no better than the current state of product liability law. To ensure that the proposed legislation achieves its primary purpose—uniformity of result—we recommend that existing Section 307 be deleted in its entirety and replaced with a new section which specifically addresses the subjects of comparative fault and contribution. Proposed language for such an amendment has been submitted to the Staff.

Senator **Kasten**. Our next witness is Professor Popper of American University.

Professor Popper.

Mr. **Popper**. Thank you, Senator. I am honored to be here and participating in this debate. I would like to echo the sentiments of other witnesses, applauding Senator Danforth, Senator Kasten and others who have attempted to put together some form of workable compromise in this very difficult field.

Title III is the topic of our panel and I must say I find it impossible to analyze title III in isolation, since the tradeoffs or compromises in title III are the result of that which has been done or not done in title II and the rest of the bill.

Had Title II established a compensation system that was truly a simple and easily accessed system, guaranteeing persons compensation when they have been injured by products, then the compromises reflected in title III, the kind of lean negligent system, might be quite acceptable.

However, since title II is not such a system but is instead a fault-based minitrial system that seems likely to result in litigation and confusion, one has to view title III with some skepticism.

I am going to divide my comments in two parts. First, I am going to comment on what is not in title III and then what is in title III. My comments are based on the assumption that the bill is passed as a whole.

First is the matter of what is missing in title III. What is not in title III is relief from the problems of negligence which gave rise to the rapid and dramatic evolution of strict liability in tort. What is not in title III are solutions to the problems of proof of negligence, such as the enormous difficulty surrounding the use of res ipsa loquitor.

What is not in title III are solutions to the use of negligence per se for proof of a violation of due care when common sense tells us that that is appropriate; for example, with a violation of the statute. Instead, in the area of violation of a regulation or statute, what title III tells us is that compliance is evidence of due care per se.

The bill does not provide for presumption of negligence where there has been a construction defect. I think that is an eventuality that would have happened, had section 402(a) not become so much a part of our common law heritage.

In short, several essential facilitating mechanisms which would have made the negligence system more workable are not included in this bill. Contrary to the comments of earlier witnesses, title III envisions a return to an earlier era, much like the movie "Back to the Future." Title III of this bill will send us back in time about 25 years to a world where tort litigation was tough, cumbersome, complex and unproductive at times, and where defendants could prove that notwithstanding the production of a clearly defective product, liability could not be imposed because somehow they comported with industry standards.

Getting specifically to the bill, just a few things. First, I think the bill has misplaced the timing question which is essential in negligence. Due care in terms of product integrity and design should be assessed in a continuum beginning from the point the manufacturer produces and ending at the time the consumer takes the product.

The bill seems to terminate the due care period at the time the manufacturer loses control.

Second, the bill fails to employ a negligence per se test in the negligence construction area. Even in S. 44 and S. 100 this was present. It seems hard to believe that we would move away from that now.

Third, in the area of warranties and failure to warn, the bill introduces reliance and risk utility tests which seem to be repudiated in the case law and a step backward. Failure to warn is a breach of a duty of care. It is fairly straightforward in our case law; it should be in title III.

Fourth, the postmanufacture warning provision of the bill provides absolutely no incentive to recall a product. It is unfortunately the case that a postmanufacture warning letter is often a futile gesture. The bill should at least recognize that a recall or an attempt to repair or some other step can be necessary as part of the due-care obligation.

Fifth, as to learned intermediaries or third party warnings, the bill fails to engage in the presumption that warnings regarding product risks should be direct to the consumer. Certainly, there are situations, including doctor-patient relationships, where direct warnings are impossible or likely to produce misinformation. But a bill of this nature, given the opportunity to recraft negligence, ought to engage in the presumption that warnings should be direct and not isolated.

Sixth and perhaps most troubling in title III is the legal presumption that compliance with government standards is somehow proof of due care without more. Compliance with a government standard is "some evidence" of due care, but it is not dispositive as the bill would have it.

In this area, the maxim that is more often articulated, at least in the common law, is that when one is noncompliance with a statute, that is evidence of a breach of a duty of care, but somehow the bill has turned things around.

As to expert testimony which is part of title I but affects intimately the implementation of title III, I have a hard time understanding the use of peer supported review as being a basis for including or excluding expert testimony. This prohibition on expert testimony is going to make it extraordinarily difficult to prove up negligence and design defect and other matters central to a plaintiff's case in a negligence action.

The proposition has no support in the literature, no support in the case law, and it is hard to find a valid public policy rationale.

The effect of this clause will be to prevent discussions on the taxonomy, epidemiology and cause of disease. I cannot understand why that would be done, particularly when you consider that the plaintiff's burden of proof under title III is to develop an appropriate standard of care in highly technical industries and then compare that standard of care to that which has been done.

Thank you very much.

[The statement follows:]

STATEMENT OF ANDREW F. POPPER, PROFESSOR OF LAW, THE AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW

I. INTRODUCTION

I have been asked to comment on title III of S. 1999, "Product Liability Voluntary Claims and Uniform Standards Act" of 1986. Title III of this bill provides the legal standards applicable to the conventional or residual negligence system which would be available for state court litigation. It is impossible to analyze title III in isolation, since the tradeoffs or compromises in title III are the result of that which has been, or has not been, provided throughout the rest of the bill. Had title II established a compensation system that was truly a no-fault system, guaranteeing injured persons compensation when they have been injured by products, then the compromises reflected in title III might have been acceptable. However, since title II is in no way such a no-fault system, but is instead a complicated mini-trial system destined to create litigation and confusion for years to come, the compromises represented in title III must be viewed with tremendous skepticism.

As with S. 44 and S. 100, S. 1999 provides an opportunity to deal with major legal policy issues in the personal injury area. To its credit, S. 1999 provides consumers with more alternatives than its predecessors; however, it reflects a preference to the manufacturing and insurance communities and thus must be rejected.

Assuming title II was a true no-fault compensation system, and focusing just on title III, there are two sets of problems. First, there are clear imbalances summarized and discussed in the last section of this statement. The second set of problems involves not what is within title III, but rather what is not in title III.

What is not in title III is relief from the problems of negligence which gave rise to the rapid and dramatic evolution of strict liability in tort. What is not in title III are solutions to the proof problems of negligence, such as the enormous difficulties surrounding the use of res ipsa loquitor. What is not in title III are solutions to the use of negligence per se for proof of a violation of due care when common sense tells us that is appropriate, as in the violation of a statute. Instead, in this area what the bill tells us is that compliance with a regulation is evidence of due care per se! The bill does not provide a workable formula for negligent misrepresentation, an area which would have evolved to the point of jettisoning the reliance requirement, had the field not been changed by the adoption of 402(a). The bill does not provide a presumption of negligence where there is a construction defect, an eventuality that would likely have been part of our common law heritage had 402(a) not been adopted.

In short, those things which would have made the negligence system more workable in the mid to late 1950's but which were not done because of 402(a) are, in this bill, not considered. Like the movie "Back to the Future," title III of the bill will send plaintiffs back in time, twenty-five or thirty years ago, to a world where tort litigation was cumbersome, complex, and often unproductive, and where defendants were provided every conceivable opportunity to convince the court that their defective and killing products cannot be the basis of liability because they acted in a manner that comported with industry standards.

II. BRIEF ANALYSIS OF SELECT SECTIONS OF TITLE I

a. Definitions

In title I, a few problems must be mentioned. First, in Section 102(2), the term "claimant" seems to leave out the possibility of class action.

In Section 102(8), the term "harm" requires physical illness, injury, or death, or mental anguish or emotional harm caused by physical illness or injury. Such construction seems to require the manifestation of physical symptoms of emotional distress. Many serious psychological dysfunctions which can have profoundly debilitating symptoms have no symptoms of physical illness or injury. Accordingly, the definition falls far short of the overwhelming majority of caselaw which views psychological injury as a phenomenon which does not require a manifestation of "physical illness" as is required by this definition.

In Section 102(12) the term "product" seems to leave out the range of products referred to as biochemical catalysts, an oversight which may make this bill inapplicable to high-technology DNA modification, genetically-engineered products, and similar items. In the same definition of "product," the term "water contaminant" is simply excluded. Excluding "water contaminants" is too broad and subsumes a broad range of toxins, additives, and household products.

The most important exclusion in the definition of "product" is the exclusion of tobacco and alcoholic beverages. It strikes me as preposterous to take the time and energy of the Congress to deal with the alleged crisis in product liability law, but then to back out tobacco and alcohol. Indeed, tobacco and alcohol related injuries might well be best addressed under a system similar to that which is described in title II of this bill.

In Section 102(13) the term "product seller" includes individuals who "prepare and blend" products. Under most conventional definitions, one who prepares and/or blends a product is a manufacturer, not a seller. This is of obvious significance because product sellers stand in a lesser-risk capacity than do product manufacturers. Pharmaceutical companies which prepare and blend various raw products, based on this definition, are not manufacturers but are in fact product sellers. Along the same lines, individuals involved in installation and repair are construed as sellers under this bill, when those persons may well be manufacturers due to significant changes that they might make in the character of the product.

The final definition which I find troubling involves "relevant point in time," a matter taken up in 102(14) and elsewhere in the bill. This definition represents a policy choice made by the drafters in which the time for judging the presence or absence of due care is invariably the time when the product left the manufacturer or was certified by the federal government. This is a clear policy preference: the drafters could have chosen, just as easily, the time at which the consumer takes control of the product or is reasonably likely to take control of the product. Such timing issues have tremendous impact in terms of responsibility for the integrity of products over their useful life.

b. Preemption

In Section 103(f) we learn for the first time the stated purpose of this bill: "To promote uniformity of law in the various jurisdictions." For the last few years, the premise of uniformity has been among the major justifications put forward to support federal product liability legislation. S. 1999 is unlikely to produce uniformity in any meaningful way. Certainly, Title III, which is a negligence statute, allows for varying interpretations and damage awards in a manner no different than that which exists today. Title II is complex and will be administered by different courts in every state. The standards of risk utility and "unreasonably dangerous" are unlikely to prompt uniform applications.

The most obvious example of the illegitimacy of the uniformity claim comes in the punitive damage provision of Title III. In that section, the bill permits the retention of state law which restricts punitive damages, but in those states where punitive damages are permitted today, that portion of the law is wiped out and in its place is inserted S. 1999. As I understand the complaints of industry, it is the unevenness of product liability awards that concern them most; hence, one is hard pressed to understand this statutorily imposed nonuniformity.

Section 104, involving record retention, has several problems. First, and most importantly, the idea that records should be retained regarding products is a noble gesture: the problem is, the information is given to plaintiffs pursuing Title III, and not to plaintiffs pursuing Title II. This guarantees that when a claimant makes the election between Title II and Title III, they will be uninformed. Title II claimants must be able to have access to information to determine whether there has been negligence, gross misconduct, or other types of activity on the part of the manufacturer which would justify litigation under Title III. Throughout this bill, there are instances where claimants are unable to receive information which is essential to informed decisionmaking on their part, while manufacturers are guaranteed information to allow them to make informed choices. For example, manufacturers are entitled under Title II and Title III to all information regarding a claimant's alleged disability, the circumstances of the accident, or other matters pertaining to the validity of the claimant's request. In contrast, under Title II claimants are entitled to nothing that would give them any hint of prior problems with a product.

A second problem with Section 104 relates to the kinds of information that need to be retained. Under the bill, manufacturers must retain "studies or reports" which they possess or control. Two modifications seem obvious. First, reports to which manufacturers have access should be made available as well as reports which are under the control of the manufacturer. Second, the terms "studies or reports" is too narrow. Instead, the language ought to require the retention of records of and concerning the use, stability, durability, risks, properties, characteristics, or other functions of the product. Records pertaining to product malfunction, deviation, nonconformity, or similar circumstances also should be retained.

In 104(c) of the record retention provision, there are extraordinarily weak sanctions for the willful destruction of materials required to be retained. I would recommend that in addition to the sanctions listed, a manufacturer or insurer who willfully destroys, removes, or alters such records by put in the position of having to show cause why a decision should not be entered in favor of the claimant.

In 104(d), which involves the nonwillful loss of records which must be retained, I would recommend that the term "nonwillful" be changed to "negligently or nonwillfully." In that same section, it seems completely inconsistent to require a plaintiff to show that "no other means are available to establish the facts" which are involved in the destroyed records.

Section 108, involving expert opinion, is among the more troubling and unacceptable sections of this bill. The section precludes the use of expert testimony in both Title II and Title III unless the testimony "has support in peer-reviewed" journals. This general prohibition on expert testimony will make it extraordinarily difficult to prove up negligence, design defect, and other matters central to a plaintiff or claimant's case. The proposition has little support in the literature, no support in caselaw, and no valid public policy rationale. It appears to be designed to prevent discussions of disease taxonomy, epidemiology, and novel causation theories. This section is particularly troublesome because the language of Title III puts the plaintiff in the position of having to prove the lack of due care on the part of a manufacturer or producer in innumerable, technically complex situations.

Manufacturers can present fact evidence regarding their practices. Competent manufacturers are well advised to develop prophylactic product liability programs which will allow their own employees to become involved as fact witnesses in product liability cases. In contrast, claimants must rely on expert testimony to develop both an appropriate standard of care and then the relationship between that standard and practices the plaintiff contends were engaged in by the manufacturer. In the absence of liberal expert testimony rules, such a prohibition is impossible.

So long as this bill uses negligence as the basic system for proof of fault-based liability, it must recognize that proof-liberalizing devices are essential. Expert testimony, judicial notice, res ipsa loquitor, and other proof-facilitating mechanisms are essential. Unfortunately, in each of these situations where plaintiff facilitating devices are required, the drafters of the bill have made either inadmissible, or by their omission from this legislation, created a complex interpretative problem regarding state law. Since this bill preempts state law, it is not clear what will happen to proof-facilitating mechanisms not addressed in this proposed legislation.

In Section 109, S. 1999 precludes the introduction of evidence of subsequent remedial measures in any case under Title II or Title III. The adoption of Federal Rule 407 for both Title II and Title III is wrong. Under the present state of the law, evidence of subsequent remedial measures is admissible in strict liability and warranty cases in many jurisdictions. (See, e.g., *Murray* v. *Shatterproof Glass*, 758 F.2d 266 (8th Cir. 1985).) The leading treatise in the area deals with the introduction of evidence of subsequent remedial repairs directly: "The contemporary corporate mass producer . . . manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product and risk innumerable additional lawsuits and the attendant adverse effects upon its public image simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement." (Weinstein & Berger, "Weinstein's Evidence," ¶ 407[2] (1982).)

Given the fact that Title II is not fault-based, and requires a determination of unreasonable danger in a very short period of time, it is unfair to eliminate the use of subsequent remedial measures. This is particularly problematic since Section 205(b) of this bill requires an analysis of risks that can be foreseen. Given that potential proof obligation, to prevent a plaintiff from having access to evidence of subsequent remedial measures seems improper.

In terms of Title III, the use of subsequent remedial measures in negligence cases has been a question of state law and state public policy. To be sure, the majority of the states follow the mandates of the Federal Rules and prohibit the introduction of such evidence. However, this legislation represents an opportunity to draft the law, creating standards that will provide for efficient litigation, efficient dispute resolution, and incentives for product safety. I have yet to meet a manufacturer who will openly acknowledge that a risk will be maintained in one of its products on the off-chance that a product liability case might be more difficult to win. Such inhumane considerations are not part of our ethic, and seem inappropriate in this legislation.

In Section 112, regarding the effective date of this legislation, it is not clear what effect this bill will have on pending claims. I would assume that any claim filed prior to the passage of this bill would be adjudicated under existing state law. I would assume further that persons injured prior to the passage of this bill would have an option of using existing state law or this system. However, perhaps by my oversight, I could not find the section of the bill which explained these options.

III. BRIEF ANALYSIS OF SELECT SECTIONS OF TITLE II

On June 25, 1985, I testified before the Senate Committee on Commerce, Science and Transportation on compensation systems. For purposes of comparison, I looked at the literature and caselaw in the worker's compensation field. I concluded that benefit levels in that area are unrealistically low, administrative problems in implementation are rampant, definitions of compensable injuries are unclear, and that fundamental objectives of compensation have not been met. The empirical evidence regarding the failure of worker's compensation is overwhelming. The stark fact that OSHA is in existence and that 402(a) has been applied on a regular basis to the workplace environment are clear indications of the failure of worker's compensation as a safety incentive mechanism.

Since worker's compensation is the only compensation program in the United States roughly comparable to Title II, I would ask the Committee to consider my comments of last June in interpreting this testimony today. In my research on worker's compensation, I found massive criticism and a consistent demand for a federal "overhaul" of worker's compensation. This being so, it is hard to visualize a compensation system that would somehow avoid all of the problems of worker's compensation.

It must be kept in mind that worker's compensation is a no-fault system. So long as the injury arose out of and in the course of employment, and is the kind of injury which is characterized as a compensable disability, employees are entitled to collect. This is a far cry from the complex, proof-laden system set out in Title II of S. 1999. Compensation models are acceptable trade-offs, according to the Supreme Court, only when the tort system which is given up for something of real value. (*New York Central Ry. Co.* v. *White*, 243 U.S. 188 (1917)) Opting into Title II, and thereby giving up the ability to litigate a negligence claim, is a dangerous step for a plaintiff to take. Title II is fraught with complex terminology and is in no way a no-fault system. As such, it probably imposes an unjust trade-off for consumers.

Before getting into the individual sections of Title II, it should be stressed that Title II compels a consumer to make a completely uniformed choice. Records required to be kept based on Title I are unavailable to consumers who must choose between compensation or negligence litigation. In contrast, under both Title II and Title III, manufacturers are entitled to full information regarding the claimant's situation and accident theory. Given the emphasis on market economics that seems to underlie portions of this bill, it is unfair to compel plaintiffs to make uninformed choices at the outset. Review and disclosure of records required to be kept regarding products in advance of making the Title II election seems essential to allow informed choices.

Looking specifically to Title II, Section 202 regarding the manufacturer's net economic loss, there are several problems. The bill limits recovery to "net economic loss" and denies recovery for pain and suffering. Pain and suffering has a real, biological or physiological basis and commonly attends profound injury. Discomfort, agony, and differing degress of pain and suffering are not easily quantified, but they are real and central concerns of injured persons. It is grossly unfair to eliminate pain and suffering from consideration in this bill.

Chief Justice Bird recently articulated the plight of injured persons experiencing pain, but with limited economic loss:

> For a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from noneconomic damages. Similarly, a person who has been hideously disfigured receives only noneconomic damages to ameliorate the resulting humiliation and embarrassment.

> Pain and suffering are afflictions shared by all human beings, regardless of economic status. For poor plaintiffs, noneconomic damages can provide the principal source of compensation for reduced lifespan or loss of physical capacity. . . . [Often] these plaintiffs may be unable to prove substantial loss of future earnings or other economic damages.

(*Fein* v. *Permanente Group,* 695 P.2d 665 (Cal. 1985), dissenting opinion, Bird, C.J.)

In a compensation system, it is essential to include a provision for pain and suffering. Due to the difficulties in quantification of pain and suffering, I would have anticipated some limitation on pain and suffering in the bill, such as a numerical cap, percentage cap, or similar vehicle. Instead, nothing has been provided for pain and suffering. The absence of this provision makes Title II completely unacceptable.

The research on pain and suffering is gruesome and need not be replicated in this testimony. Suffice it to say that for decades, courts have dealt with the difficult question of quantification but managed to allocate funds for the physiological and biological phenomena of pain. The mere fact of difficulty of decisionmaking has not prevented courts from engaging in this process.

In Section 202(a), net economic loss is defined as including "reasonable expenses incurred for reasonably needed and used medical and rehabilitation care. . . ." The redundancy in the language, the second "reasonable" qualifier, is telling. This section appears to compel the plaintiff to pare down to the bare minimum medical expenses, giving ample opportunity for defendant challenges.

In subsection (B) of 202(a)(1), there is a qualifier which suggests that one cannot be compensated for lost income where the claimant could have worked but somehow failed to undertake employment. In the world of unemployment compensation, the question of what employment one must undertake when one is physically disabled is litigated every day. To put this in as part of the compensation question is problematic. Compensation under Title II is to be for those net economic losses, including lost income, which are the result of the injury. To get into the question of employment which somehow one might have undertaken seems to interject a hypothetical that is destined for litigation and dispute.

In another part of Section 202, the bill permits compensation for the claimant's immediate family for their economic losses which are of a direct result to the claimant's injury. That should be extended to "family or dependents."

Section 202(a)(1)(E) revives the collateral source rule. When read in conjunction with subpart (D), there is an evident policy preference that is quite troubling. Under these two sections, state law which permits collateral source limitations as well as death benefit limitations is maintained, as is done in Title III, where state law is retained which permits limitations on punitive damages. Strong state policies not permitted include the adoption of negligence per se for construction defect, the admission of subsequent remedial measures evidence in strict liability and warranty, and the use of the standard "reckless disregard" in punitive damages.

In 202(c), if a manufacturer believes that somehow, somewhere there is an additional source of funds that might offset the claimant's entitlement, the manufacturer is given the right to withhold otherwise due and owing compensation in an interest-bearing account while the manufacturer engages in some kind of factfinding process to determine whether there shall be a set-off or not. To deny a claimant timely compensation under such a provision is wrong. Claimants should be entitled to receive these funds, and if it turns out that later on there is a set-off allowed, a manufacturer should be entitled to seek recoupment.

Section 203(c) involves the claimant's responsibility to provide the manufacturer with information. Prior to making its determination of what action to take when presented with a claim, a defendant is entitled to full medical care and accident sequence information. This section would not be troubling if the plaintiff was also entitled to full information which the defendant manufacturers are required to keep. However, since the bill prohibits plaintiffs from receiving information required to be kept, Section 203 represents a simple and unacceptable imbalance.

Section 205, the liability for harm section, is flawed at a number of different levels. First, the section relies on an "intended or anticipated" use doctrine which is repudiated in tort law. Instead, a simple foreseeability test should have been inserted. Second, the bill brings into question plaintiff's exercise of reasonable care at the outset in every compensation case. This is done without reference to the normal cautions attendant to assumption of risk, which require a showing that a risk is confronted in a voluntary, unreasonable, and knowing manner.

[My analysis of Title II from Sections 205 through to the end of that section is identical to the analysis of Professor Teresa Schwartz. I join her in her comments.]

IV. PRINCIPAL PROBLEMS WITH TITLE III

a. General Comments

At the outset, I mentioned that the problem with interpreting Title III in isolation is that it represents a tradeoff. A "lean and tough" negligence system is acceptable only when the linked compensation system is a no-fault system. Unfortunately, Title II is in no way a no-fault system. Accordingly, Title III is, in its entirety, unacceptable. Assuming a compensation system were put into effect which provided for prompt, no-fault payment on receipt of a compensation claim, Title III becomes more defensible.

A few years ago, an analysis was done on the economic efficiency of a negligence system versus a strict liability in tort system (not a compensation system). The conclusion of that fairly extensive research was that negligence is brooding uncertainty with substantial transaction costs. Strict liability in tort, in contrast, is a system with lower transaction costs which clarifies rights and is fairly efficient from an economic standpoint. (Rizzo, "Law Amid Flux: The Economics of Negligence and Strict Liability in Tort," —— Journal of Legal Studies 291 (1981).) Notwithstanding this research, I am of the opinion that a well crafted negligence system is at the heart of our civil liability field. In conjunction with strict liability in tort, negligence has been an effective vehicle for addressing unique and highly-varied claims in almost every area of human intercourse.

Unfortunately, the negligence system did not suit the product liability field as well as other areas. Mass producers whose transgressions involved design choices were too protected under the negligence regime, giving rise to strict liability in tort. Proof problems with negligence, also the result of an earlier era, made negligence a difficult formula. It was my hope that the negligence section of this bill, Title III, would take a fresh look at the essential reasonability standard and facilitate the process of proof.

In some ways, this section of the bill is a success. Rather than selecting the extraordinarily complex language of earlier drafts, there is some simple reference to "a proximate cause," "reasonability," and "foreseeability." These simple terms are central to a negligence formula, when used properly, and are useful parts of this bill. Other sections of the bill seem somewhat one-sided.

My problems with Title III are fairly straightforward. First, I believe that the bill has misplaced the timing question essential in negligence. Due care in terms of product integrity and design should be assessed in a continuum beginning from the point that the manufacturer produces the product and ending at the time the consumer takes possession. The bill terminates the due care time period at the point where the product leaves the control of the manufacturer. This is unrealistic and backwards.

Second, the bill fails to use negligence per se in the negligent construction area. Even in S. 44 and S. 100, negligent construction was a matter which was not defensible based on a manufacturer's due care proffer. A product which is constructed in a way that causes injury is negligently constructed per se, and at a minimum the bill ought to enter into that presumption.

Third, in the area of negligent failure to warn, the bill introduces reliance and risk utility as part of the liability calculus. Both of these concepts have been repudiated in the caselaw and represent a step backwards. Warnings should be given, and the failure to give a warning breaches a duty of care. Reliance is normally presumed. Risk/utility is not an essential assessment where there is an obvious risk which could be ameliorated by a warning.

Next, the post-manufacturer warning provision of the bill provides absolutely no incentive to recall the product. It is unfortunately the case that a post-manufacturer warning is often a futile gesture. This bill should recognize that recall or attempts to repair products or some other step is required when a manufacturer becomes aware of a problem with a product which is already on the market.

As to learned intermediaries or third person warnings, the bill fails to engage in the presumption that warnings regarding product risks should be direct. Certainly, there are circumstances including the doctor-patient relationship where direct warning is impossible or likely to produce misinformation. However, the burden should always be on the defendant to establish why a direct warning was not given. Instead, the bill establishes standards which allow for the expansion of the learned intermediary doctrine, a doctrine designed to keep product safety information away from consumers.

Perhaps the worst section of this bill involves the legal presumption that compliance with government standards is per se evidence of due care. In title II this is the device for "liberating" the entire pharmaceutical industry. The law in almost every jurisdiction is that compliance with a government standard represents evidence of due care but is not dispositive. In this area, the maxim that is more often articulated is one which finds noncompliance with a government standard or statute as evidence of a breach of a duty of care. Making compliance with government standards dispositive proof of due care is not only bad from the standpoint of a negligence system, it is an anticompetitive doctrine which creates disincentive to product changes.

As to the liability of sellers, I have testified on several occasions that sellers ought to be in a position of bearing strict liability for products which they place into the stream of commerce. In the negligence area, sellers ought to have the same duty of care that manufacturers have. In Title III, I am troubled by the apparent incompatibility regarding the duty to inspect a product, where there seems to be a presumption of due care if a seller turns over to a consumer the labels, instructions, or warnings provided by a manufacturer. Greater clarity in this area is essential if sellers are to bear their appropriate responsibility.

A final major complaint with Title III involves the standard for punitive damages. Under the bill, punitive damages can only be received when there is clear and convincing evidence of "conscious, flagrant indifference." The caselaw in this area suggests that punitive damages are available in many states when the defendant's activity represents recklessness. Language such as "reckless indifference" presents a more accurate picture of state law than the language in S. 1999.

The areas mentioned above are discussed in more detail below.

b. Analysis of Select Sections of Title III

The heart of Title III is in Section 302, which sets out the standards for liability for negligent construction, design, formulation, warning, instruction, or warranty. The bill does not include a discussion of implied warranty or negligent representation, two fields in the tort area which were growing, but whose development was restricted by the adoption of 402(a) of the Second Restatement of Torts in virtually every state. Since Title III and Title II do not acknowledge the existence of strict liability in tort, one would think that Section 302 ought to provide some discussion of these alternative remedies.

Section 302(b) involves the cause of action for negligent construction. In *MacPherson* v. *Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916), the New York courts permitted a product liability claim for negligent construction. The *MacPherson* standard was adopted in section 395 of the Second Restatement of Torts, and is reflected in Section 302 of this bill. However, while negligent construction is the simplest of the product liability actions to understand, it can be the most difficult to prove. "In many instances it would be difficult, if not impossible, to establish specific acts of negligence in the course of the manufacturing process." (Sherman, "Product Liability for the General Practitioner" (1981) 8) The difficulty lies in the fact that consumers are often incapable of responding to a manufacturer's claim that it exercised due care in manufacturing a product which turned out to be negligently constructed. Under 302(b), a manufacturer is provided an absolute defense by showing that it exercised reasonable care in constructing a product, something that can be met by establishing fairly facile industry standards. A product can be totally defective, cracked, broken, and deadly but still not be the basis of a negligent construction claim because of the way 302(b)(2) is written.

To accommodate this problem under the present system, res ipsa loquitor is used (particularly prior to the adoption of 402(a)). Res ipsa loquitor requires an assertion on the part of the plaintiff that an accident occurred which was more likely than not the result of someone's negligence; that at the time the alleged negligence occurred the commodity was under the control of the defendant; that the plaintiff did not voluntarily assume a risk; and in a few states, that the defendant has better access to the evidence than does the plaintiff. The doctrine is confusing and given different receptions in the various states. In some states, a successful res ipsa case can be the basis of victory, in some states a res ipsa claim shifts the burden of proof, in some states proving up the elements of res ipsa is merely an added advantage and does not shift the burden of proof or dispose of the claim. This bill is an opportunity to clarify the application of *res ipsa* in the negligent construction area where it is necessary. Unfortunately, the bill does not do so.

Beyond the omission of res ipsa there is the question of timing. It is simply a matter of common sense that a product's construction or product integrity is something to be judged when the product reaches the consumer, not when the product leaves the control of the manufacturer. It is one thing to be concerned about intermediary product handlers who might somehow destroy the product. However, to create an absolute timing bar, excluding all evidence that pertains to the product after it leaves the control of the manufacturer is wrong.

In 302(b)(1) the drafters establish that a construction defect is found when a product deviates in a material way from design specifications of the manufacturer or from units in the same lot. If that standard is to be applied, and a plaintiff can establish it, then a presumption of negligence per se should be made. This is the simplest case in the product liability area, yet by the addition of subpart (2) of this provision, one can easily foresee extensive litigation which will thwart deserving plaintiffs. In addition, the requirement that a product deviates in a "material" way seems unusual. It seems the sole question to ask is whether the product deviated in any way from the design specifications, and then later whether that defect caused an injury.

302(c) involves design. The only criticism at this time of this provision is with the term "danger," found in 302(c)(1). Instead of the term "danger," the term "characteristic" or "proclivity" should be inserted. In the design defect area, it is not red flags of danger that count, but understanding characteristics of products and their relationship to risk. There is also a problem in understanding the term "relevant point in time" in the first part of 302(c). The definition of this term in the beginning of the bill does not give us any guidance as to what the relevant point in time is.

302(d) involves the duty to provide warnings or instructions at the time the product left the control of the manufacturer. Under this section, a manufacturer is obligated to provide a warning if it is aware of a danger connected with a product. I assume that the drafters of this section intended the phrase "a proximate cause of the claimant's harm" for purposes of both logic and consistency.

In 302(d)(2) there is a very troubling set of presumptions. This clause appears to obligate a manufacturer to provide only those warnings which would materially affect the conduct of the consumer, and which are somehow cost-justified based on the type of harm and the seriousness of the injury. The idea that there should be a weighing out of probabilities in this section is wrong. In *Reyes* v. *Wyeth Laboratories,* 498 F.2d 1264 (5th Cir. 1973), the court held that when a risk requires a warning and a warning is not provided, the failure to provide such a warning renders a product defective and unreasonably dangerous. No assessment of probabilities is required. The cost of producing the warning when compared to the risk involved is not a factor which courts have permitted. (*Ionmar Co.* v. *Central of Georgia Railroad,* 471 F. Supp. 942 (S.D. Ga. 1979)) The presumption in most of the caselaw is that a warning is an inexpensive vehicle and is not excusable on a risk-utility basis. (*Pavlides* v.*Galveston Yacht Basin, Inc.,* 727 F.2d 330 (5th Cir. 1984)) The caselaw is fairly clear that there is a simple duty to instruct and warn as to risks or product proclivities which are foreseeable. Little else is involved in the caselaw, and little else should be involved in this statute.

Perhaps more troubling than the balancing implicit in 302(d)(2) pertaining to cost-benefit analysis is the section of the statute which requires the plaintiff to show that the presence of the warning would have materially affected their conduct. This provision interjects a detrimental reliance and credibility question into warnings cases which, heretofore, has been heavily criticized. Product hazards require warnings. It is not the responsibility of the plaintiff to show that the warning would have materially affected the conduct. This is going to produce complexity in the trial process and expand litigation costs.

In 302(e) the manufacturer is obligated to provide a post-manufacturer warning if the manufacturer becomes aware of a product risk after the product has been sold. Caselaw requires that manufacturers provide such warnings by devices beyond a letter and that such warnings be direct and not to an intermediary. See, for example, *Miller Industries* v. *Caterpillar Tractor,* 733 F.2d 813 (11th Cir. 1984). In that case, the court found that there was a duty to warn that extended beyond the mere sending of the letter. Indeed, there is caselaw that suggests that a simple warning or even a letter is inadequate and that product recall or further remedial measures must be undertaken when a manufacturer becomes aware of product defects. In *Braniff Airways* v. *Curtiss-Wright,* 411 F.2d 451 (2d Cir. 1969), the court held: "It is clear that after such a product has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger." (411 F.2d at 453.) To be sure, there is caselaw suggesting that the post-manufacturer responsibility is limited to simple warning. However, given the opportunity to clarify the law, it seems appropriate to protect those most in need of protection: the consumers. This section should be expanded to make clear that the responsibility of a manufacturer is not just to provide simple warning, but where necessary to remedy the defect or recall the product, if that is the only way of protecting the consumer's interest.

In 302(f) the bill provides a defense to a direct warning, based on the presence of an intermediary, who "could be expected to take action to avoid the product user's harm." The section goes on to suggest that there are some products which, when used under the supervision of an expert, do not require direct warnings because of the presence of the warning, so long as a warning has been provided to the expert. This provision is loosely referred to as the "learned intermediary" provision and reflects a policy choice inconsistent with the interests of consumers. Under this provision, it is not hard to see how a seller could somehow become an intermediary expected to take such steps to protect the purchaser, thus relieving a manufacturer of obvious warning responsibilities. The language "could be expected to take action" is ambiguous and provides infinite options to defendants seeking to avoid responsibility.

The learned intermediary section should start out with a presumption in favor of direct warnings. Only where an individual has an unequivocal legal duty to take action on behalf of another should a defendant be relieved of responsibility to provide a direct warning. This provision does not represent the common law in any way, shape, or form. It is overly broad and inconsistent with basic consumer protection. (See *LaBelle* v. *McCauley Industrial Corp.*, 649 F.2d 46 (5th Cir. 1981).) The common law requires an appropriate warning designed to reach the consumer. These warnings are to be provided either prior to the sale of the product or at such time after the sale of the product that the manufacturer becomes aware of product risk. This is not a matter that may be delegated to some third person outside of a showing of extraordinary circumstances. (See *Gracyalny* v. *Westinghouse*, 723 F.2d 1311 (7th Cir. 1983).)

In the area of pharmacology and medicine, learned intermediary has become a powerful shield to liability. Outside of the area of birth control, warning to physicians are considered adequate. (See *Brochu* v. *Ortho Pharmaceutical*, 642 F.2d 652 (1st Cir. 1981).) Even in that area, however, it would seem reasonable to begin with a presumption effort will be made to communicate risks directly to the user or consumer. S. 1999 is an opportunity to create that incentive, even if the learned intermediary provision is maintained. Unfortunately, the bil fails to even pay lip service to that obligation to provide direct warning. (For direct warning cases regarding vaccine, see *Petty* v. *United States*, 740 F.2d 1428 (8th Cir. 1984).

In 302(h), S. 1999 establishes a defense for compliance with government standards. Conventional negligence law does not support this proposition. Government standards are more likely to come up in cases like *Hoskins* v. *Jackson Grain*, 63 So.2d 514 (Fla. 1953), in which the nonconformity with a statute is the basis of a finding of negligence per se.

In *Pressley* v. *Sears Roebuck* (Civil Action C81-876A, District Court for the Northern District of Georgia, March 28, 1983), the court held that the mere fact that standards have been "satisfied" does not demonstrate as a matter of law that the product in question is not defectively designed or negligently manufactured. In *Gryc* v. *Dayton-Hudson*, 297 N.W.2d 727 (S.Ct. Minn. 1980), the court found that compliance with a government standard is not evidence of due care and, for that matter, does not bar the award of punitive damages. The case is a little unusal since the government standard which evolved regarding flammable fabrics for children's pajamas was challenged as being illegitimate. The court found that there was evidence of outside influence in the promulgation of the standard that made the standard something less than pristine. Nonetheless, the proposition in the case is clear: compliance with a government standard is not evidence of due care.

In *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), the court held "compliance with safety standards promulgated pursuant to the National Traffic and Motor Vehicle Safety Act, however, does not relieve Chrysler of liability. . . ." (630 F.2ds at 958.)

A provision which relieves the manufacturer of responsibility so long as its product is in compliance with a government standards is anticompetitive and likely to deaden innovation. Once government standards issue, the motivation to improve a product declines dramatically. If a manufacturer is given the opportunity to be protected from tort liability by virtue of conformity, we can look forward to years with reduced product innovation.

A further problem with government standards involves the question of silence within the standard. If a government standard defines various characteristics of a product, but is silent as to others, does the lack of express standards regarding other characteristics protect a manufacturer?

In Section 305(a) the bill allows for punitive damages when the plaintiff can prove conscious, flagrant indifference. Punitive damages may not be awarded if the product is in compliance with government standards. As to the compliance with government standards, *Gryc* v. *Dayton-Hudson,* 297 N.W.2d 727 (S.Ct. Minn. 1980), held that compliance with a government standards does not bar punitive damages. On the question of what the appropriate standard is in punitive damage cases, there is considerable disagreement between the circuits. Quite clearly, there is a line of cases suggesting that conscious, flagrant indifference is too strong a measure. In *Wagen* v. *Ford Motor Co.,* 294 N.W.2d 437 (Wis. 1980), the court holds that where a defendant is involved in "reckless disregard of the plaintiff's rights," punitive damages are appropriate. (294 N.W.2d at 462.)

The use of reckless disregard standard seems to be common in a number of jurisdiction, although Wisconsin appears to have taken the lead in this area. Wisconsin courts have held that "an intentional desire to injure is not a necessary component of punitive damages." (*Wagen* at 442.) In *Walter* v. *Cessna Aircraft,* 358 N.W. 2d 816 (Wis. 1984), the court decided again that reckless indifference to the rights of others is a basis for punitive damages. This is not to suggest that reckless disregard is the same as negligence. Even in Wisconisn and other states which have liberalized punitive damages standards, courts are inclined to look to some element of state of mind.

The term "conscious" and the term "flagrant" when used together suggest the strictest standard for punitive damages. Some courts have stated the matter as requiring a demonstration of "indifference to whether the product might cause unnecessary injuries" *Moore* v. *Remington Arms,* 427 N.E.2d 608 (Ill. 1981)), and in such states the obligation of conscious disregard is not part of the proof calculus. Other states follow Section 500 of the Second Restatement of Torts which allow for the awarding of punitive damages on a showing of reckless indifference. However, in interpreting the Second Restatement, reckless indifference seems to indicate knowledge or a duty to know facts at a level that approaches conscious indifference. (See *Martin* v. *Johns Manville,* 498 A.2d 1088 (Pa. 1985).)

In the final analysis, I would recommend the use of the standard "reckless disregard" or "flagrant indifference." To stay with the terminology "conscious, flagrant indifference" is likely to deny punitive damages in many cases where the degree of misconduct on the part of the manufacturer is sufficiently egregious to justify the award of punitive damages.

The last part of Title III requiring some comment is the section involving repose, Section 306. The motivations for this section are certainly understandable but must be resisted. If a product has a useful life in excess of 25 years, and if the manufacturer benefits from the expected useful like of the product through its pricing structure, it is unjust to relieve the manufacturer for responsibility for that product during that product's useful life. To be sure, there are circumstances where a product is altered or changed during its useful like. In those circumstances, where such changes were not foreseeable and were outside of the manufacturer's control, liability will be shifted under conventional negligence law anyway. If repose is essential to the proponents of this bill, then I recommend the phrase "25 years or useful life, whichever is longer."

V. CONCLUSION

I have attempted to review many of the sections of S. 1999. Limitations on this forum and time make it impossible to comment in detail on the entire bill. I believe that circumstances in the manufacturing and insurance industries do not justify the elimination of 200 years of tort law at the state level.

If in fact there is a crisis in the product liability world that would justify the kind of crude and comprehensive intrusion into state law which is represented in S. 1999, then the combination of Title II and Title III represents some hope for compromise. My view is that the compensation system in this area must be based on a pure, nofault system. In the absence of pure nofault, given the compromises implicit in this bill, I cannot support the bill.

As it stands, the bill requires significant revision. I am happy to assist the staff in any way that I can in this difficult task.

Senator Kasten. Our next witness is Pamela Gilbert, Staff Attorney for the U.S. Public Interest Research Group.

Ms. Gilbert. Thank you.

Mr. Chairman and members of the committee, my name is Pamela Gilbert and I am a staff attorney with the U.S. Public Interest Research Group. U.S. PIRG is a nonprofit, nonpartisan consumer advocacy group that serves as the national office for State PIRG's across the country. U.S. PIRG, Public Citizen's Congress Watch, the Consumer Federation of America, and Consumers Union have submitted joint written testimony into the record of today's hearing.

We would like to praise Senator Danforth and the committee for the change in direction that you have taken in approaching the issue of product liability law. We applaud the attempt embodied in S. 1999 to remedy some of the formidable problems faced by product victims in today's product liability system, and we realize that finding this remedy is a complex and difficult task.

Unfortunately, for reasons that we present in our written testimony, we believe S. 1999 would fall far short of meeting its objective of providing quick and full compensation for product victims, while it would significantly reduce the safety incentives that are present in the current tort system.

I will focus my oral remarks this afternoon on title III, the tort system component of S. 1999. As a component of a claims system/tort system type of scheme, as S. 1999 is, the overriding objective of the tort system is to promote product safety. Regardless of the compensation scheme, the tort system must function to drive from the market the Ford Pintos, the Dalkon Shields, flammable fabrics, birth control devices that cause cancer and stroke, and to deter manufacturers from engaging in the type of conduct that produces such deadly products.

We fear that title III with its rules shifted dramatically in favor of the manufacturer would undermine these important goals. Title III's restrictive negligent standard would make it much more difficult for plaintiffs to prevail in product liability suits. Facing fewer successful lawsuits, manufacturers may succumb to competitive pressures to cut corners and reduce safety expenditures.

In addition, by favoring defendants, title III may deter many victims with meritorious claims against negligent manufacturers from bringing lawsuits. Thus, these manufacturers will not be held publicly accountable for marketing defective products.

We are particularly troubled by the role that title III would play in conjunction with the compensation scheme that is proposed in title II. By limiting compensation to economic loss not reimbursed by other sources, title II would leave some categories of product victims with no choice but to pursue their claims in the tort system.

Specifically, victims who have suffered severe pain, suffering or impairment, but little economic loss, such as victims of the Dalkon Shield, or product victims who have fully insured economic losses would gain little or no benefit from pursuing a title II claim.

These unfortunate victims could only vindicate their rights by overcoming the new tort law burdens that have been proposed in title III.

If S. 1999 had been the law, we might still not know of the willful misconduct of the A.H. Robbins Co. in producing the Dalkon Shield, and the thousands of women who continue to use the Dalkon Shield might never have had the opportunity to benefit from the worldwide recall of the product that successful product liability suits engendered after over 10 years of deaths and injuries and thousands of lawsuits.

Finally, I would like to mention two very important improvements in tort law that S. 1999 would make. First, the bill establishes a time of discovery statute of limitations which would open the courthouse doors to victims of products who have been excluded because their harms were not manifested until many years after exposure to the product.

This would be a long overdue change in the statutes of limitation that exist in some States today.

Second, the enactment of the provisions dealing with the preservation of records would make the present product liability litigation system function with greater efficiency and at less cost to the litigants, another very welcome change in our procedural laws.

In conclusion, I would just like to reiterate that we are encouraged by the committee's earnest attempt to address the issue of compensation for product victims. We would like to work with the committee on proposals such as we have outlined in our testimony which, instead of establishing a tort system/claim system, would establish a system of awards and penalties for settlements and set up a mediation system for smaller product claims as a way of addressing this issue.

Thank you.

Senator KASTEN. Thank you very much.

Our final witness on this panel is Liberty Mahshigian, the Product Liability Alliance.

Ms. MAHSHIGIAN. Thank you. I appreciate the opportunity to testify today on behalf of the Product Liability Alliance, of which I serve as cocounsel. We have submitted to the committee detailed comments on S. 1999. So today I will just highlight some of the major points we made on title III of the bill.

There is a growing consensus reflected in all proposed product liability bills that if tort damages are to be awarded for pain and suffering and payment is to be made to persons who may have been compensated already by other sources, liability must be based upon clear proof of fault.

We appreciate the fact that title III is in accord with this view. There are, however, several specific provisions that can be improved in title III. The first concerns product misuse. The bizarre cases involving misuses of a product should not be the responsibility of the manufacturer. More importantly, the general public should not be forced to pay higher prices for products that reflect the cost of injuries endured by persons who misuse and abuse products. The bill should be clear about this.

With regard to the postmanufacture duty to warn that applies to all manufacturers, a manufacturer who no longer makes a product should have a duty to provide postsale warnings only when it actually learns of dangers associated with the product.

Title III imposes liability on a manufacturer if it makes an express representation about the product safety and a harm results because the product was not safe as represented. This provision is fair. However, in light of the fact that reliance is the essence of liability for breach of express warranty, it is not appropriate to permit claims when the product user never saw or heard of the warranty.

Title III creates the presumption that a manufacturer who has complied with a Federal Government standard has exercised reasonable care. The current draft of the bill, however, provides that this presumption may be overcome by a showing that a reasonable manufacturer would have taken additional precautions.

The provision may not be effective, however, because it invites laymen to continually reexamine what is and what is not reasonable in highly technical areas that have been studied extensively by specialized Federal agencies.

This provision should be amended so that the presumption can be overcome only by evidence that the manufacturer misrepresented information or failed to disclose information to the Federal Government.

Consistent with the fault basis of liability in title III is that a manufacturer should not be liable for risks that are inherent in its products. Knives can cut and sugar, unfortunately, may cause tooth decay and even may make us overweight. We recommend that a provision be added to title III clarifying that a manufacturer is not liable for inherent characteristics in its products.

We recognize that much of title III reduces legal costs and expedites claims without in any material way reducing the ability of a claimant to recover damages. Two examples of this are the product seller clause and the provision for offset off workers' compensation benefits.

With regard to the punitive damages provision in title III, there have been suggestions that there is not an overwhelming number of punitive damage awards today, but that argument misses the three key points addressed by the punitive damages provision in S. 1999.

First, evidence relating to liability or the amount of punitive damages muddles the record. It creates the possibility that the jury may be prejudiced in deciding issues of liability and compensatory damages.

Second, there is the problem of accounting for the fact that the defendant may have been subject to multiple punitive damage awards.

Third, there is the problem of unpredictability of the basic standard of when punitive damages should be allowed. The provision in S. 1999 addresses these issues.

There are two other provisions that I would like to comment on briefly. The first is the provision for postsale product improvements. Manufacturers who are considering product improvements may reasonably apprehend that this evidence may be used against them in a case where a claimant attempts to show that the original product was defective. The bill should be clear that such evidence is admissible only if a manufacturer expressly denies that a product improvement was feasible.

Second, there is a need to exercise greater control over expert testimony. No matter how rational the rules of law are, that rationality will be decimated if there is not adequate control of expert testimony. This is true for both claimants and defendants.

In general, title III sets forth fair and balanced product liability rules. It will in itself reduce legal costs by stabilizing product liability law and reducing the confusion and uncertainty that has helped bring about the current national product liability crisis.

Finally, in our judgment, title III represents moderate rules of product liability law. If the number of claims is to be expanded by an alternative claims system that may permit recovery in cases in which recovery would not be allowed under many current State laws, then the tort rules may need to be made more restrictive than they are currently in S. 1999.

[The statement follows:]

STATEMENT OF LIBERTY MAHSHIGIAN, CO-COUNSEL TO THE PRODUCT LIABILITY ALLIANCE

Mr. Chairman and members of the Subcommittee, my name is Liberty Mahshigian. I appreciate the opportunity to testify before you today on behalf of the Product Liability Alliance of which I serve as co-counsel. We have submitted to the Committee detailed comments on S. 1999, which have been made part of this Record. I will this morning briefly summarize the major points we state in those comments about Title III of the Bill, the rules governing product liability civil actions. This is a vital portion of the Bill. Its uniform tort standards can put an end to the current upredictable and transaction-costly "non-system" of 51 sets of ever-changing common law rules.

There is a growing consensus, reflected in all proposed product liability bills, that if tort damages are to be awarded for pain and suffering and payment is to be made to persons who may have been compensated already by other sources, liability must be based on clear proof of fault. We appreciate the fact that Title III is in accord with this view. There are, however, several specific provisions that can be improved.

Implicit in the concept of fault-based liability is that a manufacturer should not be held responsible for an injury that occurred because the product was misused or altered. The bizarre cases involving misuses of a product should not be the responsibility of the manufacturer. More importantly, as far as the general public is concerned, the price of products should not bear the cost of injuries endured by people who misuse and abuse products. If a manufacturer acted with reasonable care to make a product safe for its intended use, it should not be held liable if the product is misused or altered, or if a person is harmed by a dangerous aspect of the product that is open and obvious. The Bill should be clear that a manufacturer is responsible only for harms arising out of the conduct that is "expected, ordinary, and familiar" of product users.

Title III imposes a post-manufacture duty to warn on all manufacturers. The duty to provide post-manufacture warnings depends on whether the manufacturer learned or should have learned that its product is dangerous. Manufacturers who have ceased making a product, however, should not be obligated to follow new technological developments. A manufacturer who no longer makes a product should have a duty to provide post-sale warnings only when it actually learns of dangers associated with the product.

Title III includes a provision that a manufacturer will be liable if it makes an express representation about the product's safety and a harm results because the product was not safe as represented. This provision is fair. However, in light of the fact that reliance is the essence of liability for breach of express warranty, it is not appropriate to permit claims when the product user never saw or heard of the warranty.

Title III indicates that a manufacturer may not be liable if its product complied with standards or specifications adopted or approved by the Federal Government. A Federal Government standard or specification establishes a level of conduct that should be expected of manufacturers. A manufacturer who has complied with a Federal Government standard is presumed to have exercised reasonable care. The current draft of the bill, however, provides that this presumption may be overcome by a showing that a reasonable manufacturer would have taken additional precautions. The provision may not be effective, however, because it invites laymen to continually re-examine what is and what is not reasonable in a highly technical area that has been extensively studied by a specialized agency. We suggest amending this provision so that the presumption of reasonable care applied when a manufacturer complies with a Federal Government standard can be overcome only by evidence that the manufacturer misrepresented information or failed to disclose information to the Federal Government.

Consistent with the fault-basis of liability in Title III is that a manufacturer should not be liable for risks that are inherent in its product. Knives can cut, and sugar, unfortunately, may cause tooth decay and even may make us overweight. Comment I of the Restatement (Second) of Torts, Section 402A (1965) recognized that many products cannot possibly be made entirely safe for all consumption. We recommend that a provision be added to Title III clarifying that a manufacturer is not liable for inherent characteristics in its products.

We recognize that much of Title III reduces legal costs and expedites claims without in any material way reducing the ability of a claimant to recover damages. For example, the product seller clause in Title III reduces legal and transaction costs without depriving the right of any injured person to bring a claim. Under this provision, there always will be a defendant from whom an injured person may seek recovery.

The provision for offset of workers' compensation benefits serves the goal of substantially reducing transaction costs. In cases involving products in the workplace, this provision eliminates litigation between manufacturers and employers. Currently, employers may bring subrogation, contribution or indemnity actions against a manufacturer whose product was involved in a workplace accident for which the employer paid workers' compensation benefits. By eliminating the employer's right to recover the benefits it paid from the worker's tort judgment, and merely offsetting workers' compensation benefits against the tort award, the injured person does not recover any less than he would under current law. It merely deprives the employer of its right to recover for workers' compensation benefits it paid.

With regard to the punitive damages provision in Title III, there have been suggestions that there is not an overwhelming number of punitive damage awards today. But that argument misses three key points addressed by the punitive damages provision in S. 1999. First, when evidence relating to liability or amount of punitive damages is introduced at a trial, the jury may be misled on basic issues of liability and compensatory damages. A claimant may introduce evidence of the defendant's wealth or the amount of profit made from sale of a product because this evidence helps establish the amount of damages that should be assessed in order to create a punishment for the defendant. Even if the jury is instructed that it should not consider this evidence on the liability or compensatory issues, as a practical matter, it does. It is fairer to separate the punitive damage proceeding from the compensatory damage proceeding—it avoids the potential prejudicial effect. Second, there is the problem of the defendant who is subject to multiple punitive damage awards. In the multiple proceedings against a defendant, the court making the punitive damage award has no reasonable way to apply the fact that the defendant has on previous occasions paid punitive damage awards for conduct related to the same product. Title III addresses this problem by permitting the judge in a post-trial proceeding to evaluate, among other factors, how much money the defendant has paid and how much it will be likely to pay in the future. Third, there is the problem of unpredictability of the basic standard of when punitive damages should be allowed. The statute should set forth a clear standard. When a defendant's conduct complies with standards adopted or approved by Congress or the Federal Government, the defendant should not be subject to punitive damages.

There are two provisions which apply to both titles of the bill that I would like to comment on briefly. Section 109 prohibits a claimant from introducing evidence that a manufacture has improved its product. Some courts have permitted evidence of post-sale product improvements to be admitted to show that the original product was not safe. This approach works totally against the goal of encouraging the manufacture of safe products. A manufacturer who is considering making improvements to its products may reasonably apprehend that in doing so he is creating massive liability for his company. Evidence of product improvements should not be admissible in a lawsuit unless the manufacturer offers a witness or evidence denying that such an improvement was feasible.

Second, there is a need to exercise greater control over expert testimony that is offered in lawsuits. No matter how rational the rules of law are, that rationality will be decimated if there is not adequate control of expert testimony. This is true for both claimants and defendants. Staff Working Draft No. 1 contained a provision requiring that expert opinion would be admissible to establish a fact only if it had substantial support among persons who are professionally qualified in the relevant discipline and in scientific or medical literature. This provision was modified in S. 1999, removing some of the requirements on expert testimony. The basis for permitting an expert to testify on a technical fact is that he has reviewed the field of scientific studies and other technical materials and is qualified to report on those materials to the jury. We urge you to return to the language in Staff Working Draft No. 1.

In general, Title III sets forth fair and balanced product liability rules. It will, in itself, reduce legal costs by stabilizing product liability law and reducing the confusion and uncertainty that has helped bring about the current national product liability crisis.

Finally, in our judgment, Title III represents moderate rules of product liability law. If the number of claims is to be expanded by an alternative claims sysem that may permit recovery not available under many current state laws, the tort rules may need to be more restrictive than they are currently in S. 1999.

Senator KASTEN. Thank you very much.

Mr. Wainwright, Pamela Gilbert said that title III represents a dramatic change or a radical change. My understanding, particularly of the design defect parts, warning cases, et cetera, is that that is not the case.

Do you agree or disagree with the fact that we have made radical changes in the present law?

Mr. WAINWRIGHT. I agree with you that this is not a radical change, and I disagree with Ms. Gilbert.

The law that I am most familiar with is the product liability law of New Jersey. So I will use that as an example. In a recent case, *O'Brien* v. *Muskin Corp.*, the Supreme Court of New Jersey recognized that in design cases the fundamental concept that is implicated is the manufacturer's conduct in choosing between alternative designs. [94 N.J. 169, 463 A.2d 298, 305 (1983]).

Effectively today in practice, even under present product liability law, you do in fact prove a negligence case as a plaintiff. You must have an expert witness who will come in and issue a report, give testimony, saying: "Here is how the product was designed. Here is what is wrong with that design. Here is my suggested alternative design, and here is why that alternative design is feasible."

The defendant may come in and assert state of the art as a defense in those States where it is allowed, and effectively what he is saying is that "No, Mr. Plaintiff's Expert, your suggested design was beyond the state of the art at the time," and then there will be a factual dispute as to whether it was within or without the state of the art at the time.

But essentially what you are proving today in court in design and warning cases is fundamentally a negligence standard, not significantly different from the concepts that are expressed in title III.

As far as manufacturing defects are concerned, as a practical matter again in practice, those cases almost never see the light of day. If there a manufacturing defect, if the product comes out with a sharp jagged edge instead of smooth round edges, as it is supposed to have, the manufacturer steps up to the line and settles those cases.

I do not think that that is a practical concern. So I agree with you, Senator. I do not think that there is any significant departure in this bill.

Senator KASTEN. Senator Danforth.

The CHAIRMAN. Do all of you agree that we should attempt to have a combination system with the claims system and a tort system combined somehow? Is this approach generally correct?

Mr. WAINWRIGHT. I think that the concept is good. I think title II needs some serious review.

The **Chairman**. I know, but I am asking for a one-word conclusion.

Mr. **Wainwright**. Yes. Yes, I think it could be made to work.

The **Chairman**. Do you agree, Professor Popper?

Mr. **Popper**. In one word, yes. I think that this is a workable scenario. Obviously, I have problems with title II and because of title II what it does——

The **Chairman**. Everybody has problems with everything. I just wanted to know if the general approach of trying to do two track with the claims system and some changes in the tort system is a fair and reasonable approach which you would support.

How about you, Ms. Mahshigian?

Ms. **Mahshigian**. Of course, our primary interest in creating effective tort reform, but we will work with you in seeing whether this approach will work.

The **Chairman**. Yes. I mean you would rather have all title III and no title II, but I mean it would be a fair approach, wouldn't it, to do both at the same time?

Ms. **Mahshigian**. If we could devise a fair title II.

The **Chairman**. How about you, Ms. Gilbert?

Ms. **Gilbert**. I'm afraid I cannot answer it in one word.

The **Chairman**. Yes or no?

Ms. **Gilbert**. I think a dual approach is something that yes, we could support. However, because of the workability problem, we would have major concerns with any claims system that has a substantive standard in it—but some type of dual approach of settlements and tort law could be acceptable.

The **Chairman**. Now, if we are going to do a dual system, what we would want, I think—I mean maybe you do not agree with this—but I would think is that we want a system where most people would rather use the simple system than the complicated system. Am I right?

And I will start with you this time, Ms. Gilbert.

Ms. **Gilbert**. Now I can say yes.

The **Chairman**. All right.

Ms. Mahshigian.

Ms. **Mahshigian**. Yes.

The **Chairman**. Mr. Popper.

Mr. **Popper**. I do not think that is so simple, because what most people "need to do" depends on information about the product which caused their injury. When they have been injured by a product——

The **Chairman**. Let me rephrase the question. Would you say that we want a system where most people would elect the claims system as opposed to the tort system?

Mr. **Popper**. I assume most people who are fully informed recognize their needs and the taxonomy of the accident. Given that information, most people would use the simple system.

The **Chairman**. Mr. Wainwright.

Mr. **Wainwright**. What is the question?

The **Chairman**. I don't know.

Mr. **Wainwright**. I think the answer is yes.

The **Chairman**. Tell me whatever you want to tell me. Make up your question.

Mr. Wainwright. Obviously, we prefer to see the majority of claims go into an administrative claims type of mechanism.

The Chairman. Right. Now, if we are going to do that, there should be, the bill should be designed in such a way, should it not, so that most people would want to use the claims system, shouldn't it?

Mr. Wainwright. I would agree with that; yes.

The Chairman. Both sides, both plaintiffs and defendants. Most people would say they would rather be in the claims system than in the tort system.

Mr. Wainwright. I would agree with that. In commenting on title II, it is not our role in this panel, but I would stress one thing.

The Chairman. I want to ask the questions if I can, because I have only got 5 minutes. And then, afterwards, you can comment.

Mr. Wainwright. Fine.

The Chairman. How about you, Professor Popper?

Mr. Popper. I assume so, yes.

The Chairman. Ms. Mahshigian.

Ms. Mahshigian. Yes.

The Chairman. Ms. Gilbert.

Ms. Gilbert. Yes.

The Chairman. Let me ask you this, Mr. Wainwright. I say this just by way of an example of what I think we should be focusing on.

I do not have a position one way or another on your idea and Senator Pressler's idea of comparative responsibility. But if you had a comparative responsibility system for title III but not for title II, wouldn't that be a powerful incentive for businesses denying claims that are made under title II?

Mr. Wainwright. Unless there were some alternative incentive to enforce good faith participation in title II by businesses, a lower burden of proof for example. I think the present system, which reduces the claimant's burden of proof and in fact places it on the manufacturer, is wrong because it overlooks one very fundamental trait of human nature, and that is mistakes are not easily admitted.

I think the burden of proof in title II should be placed on the claimant. But it can be a lower hurdle burden of proof than you would have in the tort system.

The Chairman. Let me ask all of you this question and just ask you to give me a yes or no if you could, or short answers.

Do you think that the bill, as it is presently written, weighs the decision too much toward title II or too much toward title III? That is, do you think that the way that this is now written would encourage people to avoid the claims system and go into the tort system, or would it encourage people to use the claims system and avoid the tort system?

How about you, Ms. Gilbert? We will start on the right.

Ms. Gilbert. I do feel that, as written, it is weighted in favor of the tort system simply because of the severely limited damages that a plaintiff can go after in title II and the very complex standard. I would say that a plaintiff can anticipate almost as complicated litigation in title II with an outcome of very limited damages.

The Chairman. So you think that most plaintiffs would then want, I mean if a client came to you, you would say use title III; right?

Ms. Gilbert. I think in many cases I would, and reluctantly, because I do think that title III is shifted in favor of defendants.

The Chairman. How about you, Ms. Mahshigian?

Ms. Mahshigian. I don't know if it would encourage people to go into title III, but the standard is very complicated in title II and that might be an incentive to go into title III.

On the other hand, the plaintiff's burden of proof is very low in title II.

The Chairman. So you are not too sure which way to go.

How about you, Professor Popper?

Mr. Popper. I tend to agree with Ms. Gilbert. I think that the problem with title II is its complexity and I would be hard-pressed to advise a client to go through a system which might lead to extended litigation where the rewards are low.

The Chairman. Unless they could not prove negligence.

Mr. Popper. On the other hand, it would depend on how informed they were. One of the problems with this bill is that there is an imbalance with access to information—the decision whether to opt into title II or title III is one on the part of the plaintiff that is not fully informed.

After an accident, the manufacturer will learn about the plaintiff's situation about the disorder, about the plaintiff's theory of the case; this allows the manufacturer to put its strategy together. If the plaintiff had that same information, then I think you would have informed choices, and I imagine that the bulk of clients would opt for expedited system.

The Chairman. Mr. Wainwright.

Mr. Wainwright. My answer to your question, Senator, is that I think that the bill as presently drafted would encourage plaintiffs to go to title II because they have such—well, they have no burden of proof under title II. It is the manufacturer who has the burden of proof.

But regrettably, I think the bill has gone too far and it would encourage manufacturers to routinely deny all title II claims because they don't have enough information to make a reasonable decision.

For example, there is nowhere in title II statutory authorization which permits a manufacturer to inspect the allegedly defective product before he decides to pay a claim.

Now, that is a central, crucial issue in every product liability proceeding whether it is administratively determined or whether it is judicially determined. But that is missing from this bill.

The Chairman. Could I just ask one more question? Do you think, for each of you, that if we follow the suggestion of Mr. Wainwright and Senator Pressler and had a comparative responsibility system, should we either apply it to both sections or no sections? Both titles or neither title?

That is, is it a good idea if you are to have a comparative responsibility system—and some of you would say, well, we should not have it—but if we were to have one, should we have it for both if we are going to have it for one?

Mr. POPPER. I would assume it would be completely inappropriate in title II. If title II is supposed to be the tradeoff that consumers get in exchange for the loss of section 402(a) and it is at worst a product-centered compensation system and up the scale something resembling a procedural system where you simply make a claim based on the nature of your injury, it is fully expedited system. Under those circumstances to take into account then relative degrees of responsibility and fault and knowledge would encumber the system hopelessly.

In contract, title III is negligence. Negligence initially considered contributory negligence. Now we are at comparative fault. That is probably where it ought to be.

The CHAIRMAN. Any other comments from the witnesses?

Ms. GILBERT. I would just echo that. I think it would be completely inappropriate in a compensation scheme.

The CHAIRMAN. Thank you all very much. Thank you, Mr. Chairman.

Senator KASTEN. I would like to thank all the members of this panel.

The next panel includes Mr. Goffman, Mr. Head, Mr. Connor, and Mr. O'Connell.

[Pause.]

Senator KASTEN. The committee will be in order.

Panel No. 4 today looks at the overall relationship between title II's claim system and title III's litigation system, something that we bumped up against in the previous panels, but it is our intention to look at that overall relationship.

We will begin with Mr. Joseph Goffman of Public Citizen/Congress Watch.

Mr. Goffman.

STATEMENTS OF JOSEPH GOFFMAN, STAFF ATTORNEY, PUBLIC CITIZEN/CONGRESS WATCH; PATRICK J. HEAD, VICE PRESIDENT AND GENERAL COUNSEL, FMC CORP.; AND MARTIN F. CONNOR, WASHINGTON CORPORATE COUNSEL, GENERAL ELECTRIC CO.

Mr. GOFFMAN. Thank you, Mr. Chairman and members of the committee. First, I would like to thank you for permitting us to testify here today on one of the most vital issues facing American consumers in the 1980's. But even more important, let me state how much we admire the work of Senator Danforth and his staff in producing S. 1999, as well as the work of Senator Gorton and his staff in the proposals they have made, and note how greatly encouraged we are that the committee is focusing on the most crucial question of all in this debate, which is how do we provide adequate compensation and redress for the victims of product-related injuries in a quick and efficient manner?

To do this, I guess we have to start by looking at the basic adversarial relationship between the injured victim and the maker of the product. After all, this relationship is critical since commonsense and, to a certain extent, the Rand Corp.'s study on the design of safer products, do tell us that forcing the maker of dangerous products to bear the cost of the harm the products create is a very good way to push the manufacturer into making a safer product.

And safety, of course, is the greatest efficiency of all, since the more of it we have, the less we have to worry about providing compensation and redress to injured victims in the first place.

But when compensation and redress do become necessary, the wisest course to follow, we feel, would be to pinpoint and activate the already-existing built-in incentives that both sides to a litigation have to end the adversarial relationship and to settle the victim's claim as quickly as possible.

To do so, we would like to try to keep the parties' choices as open as possible and certainly avoid undermining the safety dynamic that we just described.

Now, we think it is absolutely commendable that in attacking this problem, Senator Danforth's bill attempted to preserve as much free choice as possible for the parties. Unfortunately, by underestimating the already-existing incentives for settlement that arise in current litigation, the bill ended up by overly circumscribing the victim's choices and the victim's rights unnecessarily.

What happened is that the bill attempted to rely on a whole new system of incentives which, as it turns out, would really create a conflicting set of counter-incentives. We are very concerned that in that balance of incentives and counter-incentives, many cases would end up with a confusion of the incentive to settle, rather than a clarification of the incentives to settle.

Let me run through an example of what I mean about the over-circumscription of choice. As we read it, the bill would count on the promise of quick recovery and the threat of a negligence test in tort to persuade victims to submit claims rather than file lawsuits.

At the same time, it relies on manufacturers' attraction to the limitation of recovery in title II to net economic loss and the threat to manufacturers of title II's liberalized standard of liability to coax manufacturers into paying those claims in the first place.

Unfortunately, these incentives seem to have a second edge that cuts against settlement. The same title III negligence standard that would cow victims into filing claims rather than lawsuits is reasonably likely to encourage manufacturers to reject those claims, particularly if they are large, in the reasonable expectation that once a victim realized that some sort of litigation was inevitable, he or she would choose to litigate under title III for the larger rewards potentially available there, rather than for the reward based on net economic loss offered in title II.

Thus, the net economic loss restriction on recoveries in title II and the negligence standard in title III which are supposed to be lures to the respective parties to settle cases could actually create, at least in the scenario I just described, incentives for victims and manufacturers to end up in lawsuits.

Clearly, net economic loss functions as an unmitigated incentive for victims with lots of insurance or for victims suffering great pain and impairment to bring lawsuits.

In addition, a lot of these incentives could tend to create anomalous results in the area of product safety policy because the limitation to net economic loss may have the effect of capping liabilities even for manufacturers who are guilty of severe wrongdoing, and the negligence test in tort makes it something of an uphill fight for victims; that in turn would insulate certain manufacturers who are guilty of putting defective products on the marketplace.

What we have looked to is a somewhat simpler solution where we isolate the incentives we know, trying to build in rewards to manufacturers for offering settlements and penalties or offsets that would persuade victims to accept those settlements unless they had a reasonable belief that they could prove a bigger case or earn greater damages.

Thank you very much.

Senator KASTEN. Thank you, Mr. Goffman.

The next witness is Mr. Patrick Head of the FMC Corp.

Mr. Head.

Mr. HEAD. Yes, Senator. I am going to dispense with my statement and just talk a little bit, since I know you have heard about how bad the bills are all morning, and maybe see if we can talk a little positively.

The CHAIRMAN. Go.

Mr. HEAD. The Business Roundtable Group, as you know, Senator Kasten, has been together now for about 5 years and we have addressed all parts of the tort reform with you up to the present day.

You may remember, Senator Danforth, last time here I said if title II was not workable, would you go back to tort reform, and you said basically we lost and this is the only game in town. And I literally took that message back to my group of some 30 attorneys which represents the Roundtable, which, as you know, is probably the biggest claims payer in the world, and took a look at first, of course, the original Danforth bill and then the draft number two.

I must say along the way we experienced the same frustration that Senator Pressler did with the American Bar Association. We attempted to change their policy a couple of years ago and almost changed it by two votes in San Francisco until the trial attorneys caught up and the next time we tried to change it, we lost by a considerable margin.

But there is some sign of hope out there. The Governor of Illinois, Governor Thompson, has written to the Governors Conference, which is a change, indicating that he thinks the Governors should look at a Federal tort reform possbility.

Now, I will not go through the litany of the bad parts which you have heard all morning with regard to title II, but what we would like to do—and I would like to read just that part of our proposition on title II. I took my lawyers group back, Senator Danforth, somewhat in the same sense of frustration you have, and said this is the only game in town, tell us how you would write title II so that it is workable, because we certainly support the concept of a two-part approach, Senator, which you have asked, and we do support that.

So let me read where we came out and let me say also that we intend to submit the actual draft language to the committee at the end of this hearing in actual draft form and with explanation.

A far better approach in our opinion would be to require claimants to exhaust mandatory settlement procedures. At the conclusion of those procedures, if settlement has not been obtained, manufacturers would be permitted to make binding offers of net economic loss. In the event of a dispute about the amount of net economic loss, that issue would be resolved promptly and inexpensively through binding mediation. If a manufacturer declined to make an offer of net economic loss, the claimant would be free to pursue the remedies provided under title III of the statute.

The operating premise of our proposal is that expensive and time-consuming judicial proceedings should be reserved for those cases that truly require resolution through such cumbersome procedures. That is, cases in which there is a fundamental disagreement over liability.

In all other cases, a system of mandatory settlement negotiations, coupled with binding mediation, on the issue of net economic loss is adequate to protect the rights of all parties at the least cost to them and to society at large.

Today many lawyers view the suggestion of settlement as an admission of weakness. Knowledgeable commentators have pointed out that an alternative dispute resolution system predicated on the prompt and binding offer of net economc loss to injured persons posed the greatest promise of fair, efficient and expeditious injury compensation.

And I guess I should note that those remarks cite Professor O'Connell's works.

So we will submit that proposition to you. We have in our earlier letter indicated some of the problems in Title III that we would like to see, including the issue of joint and several and comparative fault and hope to work with the comittee on our proposed decision.

The CHAIRMAN. Thank you.

[The statement follows:]

STATEMENT OF PATRICK J. HEAD ON BEHALF OF THE LAWYERS' ADVISORY COMMITTEE OF THE PRODUCT LIABILITY TASK FORCE OF THE BUSINESS ROUNDTABLE

INTRODUCTION

Over the past decade, the Business Roundtable has joined with thousands of product manufacturers, associations and insurance companies across the country, as well as with noted legal scholars, in urging Congressional action on a uniform federal standard for product liability. We have testified repeatedly that the current system has created an unmanageable backlog in the courts and an inequitable system that serves neither plaintiffs nor defendants well.

Our testimony today represents the continuing commitment of the member companies of the Business Roundtable to achieving meaningful—and workable—product liability reform. We support the concept of an expedited claims system because it is imperative that the current crisis of excessive and non-meritorious lawsuits be tempered with reforms based on reason and justice—for all parties.

Since our last testimony before the Subcommittee in June 1985, Chairman Danforth and the staff have developed S. 1999. We believe that the "reforms" proposed in this bill are of such sweeping magnitude—and of such uncertain consequence—that much additional consultation, public comment and study are necessary. The Business Roundtable wants to be part of this on-going process and, to this end, we have submitted detailed comments on S. 1999 to the Committee and offer the following general concerns for consideration.

TITLE II—EXPEDITED PRODUCT LIABILITY CLAIMS PROCEDURE

Title II's expedited claims system as currently drafted would give claimants the option of using a non-court procedure to recover "net economic loss", but we believe that in its current form, the proposed procedure would result in a burdensome, costly system that would foster dispute rather than efficient administration.

For example, as currently drafted, S. 1999 gives a claimant a choice between a compensation process through which he can obtain an award for net economic loss under strict liability standards or a litigation process through which he can obtain greater damages by proving fault on the part of the manufacturer. Because there are limits on recovery in Title II, we believe that claimants with large claims for damages will elect litigation under Title III. On the other hand, the ease of establishing liability under Title II, coupled with the fact that "net economic loss" is defined to include attorneys' fees, will encourage the filing of large numbers of insubstantial claims that would never have been pursued under the traditional tort system.

The likelihood of generating large numbers of insubstantial claims is aggravated by Title II's vague and subjective test for manufacturer liability that presumes a product which has caused an injury is "unreasonably dangerous" unless the product's utility clearly outweighs the risk of harm. This risk/utility analysis is too complicated a test for a system designed to simplify and expedite claims.

Title II also shifts the burden of proof as to whether a product is "unreasonably dangerous" from the plaintiff to the manufacturer, requiring the manufacturer to show that the product's utility outweighed its risks, that the risks were apparent or, if the risks were not apparent, that adequate warnings or instructions were provided—but Title II fails to identify "adequacy", except for drugs and devices.

While offering the assurance of full compensation, including attorneys fees, to the successful claimant, Title II does not set a minimum dollar level for claims to be filed. This would dramatically increase the number of claims brought against product manufacturers—while raising their liability costs by an inestimable amount.

The risk of substantial increase in product liability claims is greatest in accidents involving consumer products, where the mere fact that a product was involved in an accident is not generally the result of product defect. Since consumer products are involved in so many accidents, an expedited claims system—especially one which diminishes the significance of manufacturer responsibility or fault—creates the potential for an enormous increase in claims against product manufacturers. Without a definition of the de minimus claim, we predict that this system will be inundated with frivolous cases that will place an oppressive burden on manufacturers and will delay the resolution of cases in which claimants should rightfully be awarded their actual and reasonable expenses.

We remind the Committee that our fears about the unexpected costs of new compensation systems are not without cause. When the Black Lung Benefits program was passed in 1969 as part of the Federal Coal Mine Health and Safety Act, sponsors of the bill predicted that it would provide benefits to 50,000 claimants and that its total cost would not exceed $50 million. By 1977 more than 70,000 claims had been filed at a cost exceeding $25 billion—and the administrative nightmares of the Black Lung program are well known.

In an attmept to offer expedited awards to persons who suffer harm which manifests itself only many years after exposure to an object, substance, chemical or drug, Title II also sets new and broader standards of liability for toxic harm. The fundamental criteria for liability is exposure to the chemical or drug product without regard to causation. Causation is presumed conclusively if there is evidence of exposure and if that exposure "would significantly increase the risk of incurring the toxic harm".

Title II proposes a definition that increased risk has occurred if harm is sustained by 30 percent more of an exposed population than a non-exposed population. The selection of 30 percent to establish a significant difference amounting to causation is completely arbitrary and has no scientific basis as the threshold of a presumption.

Liability for toxic harm should be imposed only after a finding based upon a reasonable degree of medical certainty that the exposure, in fact, does cause the harm. In addition, the claimant should prove that an adequate warning of the danger was not provided. Only after such findings have been made should consideration be given as to whether farm was more likely to have been caused by another toxic agent. People are commonly exposed in their daily life to a wide variety of environmental factors and produced substances—many of which might "significantly"increase the risk of harm indvidually or in the aggregate.

It is our understanding that the working group that helped to draft S. 1999 has only been dealing with the concept of the expedited claims system contained in Title II since July. Additional time and study are needed before such a system could be responsibly designed and implemented.

Because the consequences of implementing Title II, as currently drafted, would be devastating to American business, the Business Roundtable suggests that this committee consider alternatives to Title II.

A far better approach, in our opinion, would be to require claimants to exhaust mandatory settlement procedures. At the conclusion of those procedures, if a settlement has not been obtained, manufacturers would be permitted to make binding offers of net economic loss. In the event of a dispute about the amount of net economic loss, that issue would be resolved promptly and inexpensively through binding mediation. Should a manufacturer decline to make an offer of net economic loss, the claimant would be free to pursue the remedies provided under Title III of the statute.

The operating premise of our proposal is that expensive and time-consuming judicial proceedings should be reserved for those cases which truly require resolution through such cumbersome procedures—i.e., cases in which there is a fundamental disagreement over liability. In all other cases, a system of mandatory settlement negotiations coupled with binding mediation on the issue of net economic loss is adequate to protect the rights of all parties at the least cost to them and to society at large.

Today, many lawyers view the suggestion of settlement as an admission of weakness. Knowledgeable commentators have pointed out that an alternative dispute resolution system predicated on the prompt and binding offer of net economic loss to injured persons holds the greatest promise for fair, efficient and expeditious injury compensation. See, e.g., J. O'Connell, "Offers That Can't Be Refused," 77 N.W.U.L. Rev. 589, 601–604 (1982); J. O'Connell, "A Neo 'No-Fault' Contract in Lieu of Tort," 73 Calif. L. Rev. 898, 905–906 (1985).

TITLE III—CIVIL ACTIONS

The Business Roundtable believes that the opportunity for recovery of non-economic loss must be clearly defined and limited to achieve a balance between Title II and Title III. Civil actions must be based on real fault and negligence on the part of product manufacturers.

Frequently, fault is ignored as a prerequisite to recovery of damages in the tort system. In growing numbers, courts and juries have been permitted to speculate on how the redesign of a product or the use of substitute material might have prevented harm or injury to the plaintiff—and to award escalating amounts for non-economic and punitive damages.

As currently drafted, there is little incentive to file claims under Title II—when the possibility exists to file a civil action under Title III and to collect large awards for non-economic damages. The provisions of Title III and to collect large awards for non-economic damages. The provisions of Title III give the courts wide latitude to interpret various provisons that would impose liability similar to current practice.

Although proposing these and other changes of major proportion in the context of creating an expedited claims system, S. 1999 does not address the doctrine of joint and several liability which has caused major inequities in the current tort system. Total responsibility for an injury may be imposed upon a manufacturer that may have only been remotely responsible for the injury. This doctrine encourages claimants to file against financially responsible manufacturers—even though others, with limited or non-existent financial resources—are clearly responsible for the injury.

This doctrine places an undue burden on responsible, profitable manufacturers. A comparative responsibility provision should be included in any equitable reform legislation that will allow liability to be allocated among the parties responsible for the loss. Such an approach is fundamental to a fault based system of liability.

Given the opportunity that claimants have to recover net economic losses under Title II, it is essential that Title III be strengthened to ensure that civil actions are based on actual misconduct by product manufactures. In order to affect meaningful reform in the current product liability system, as a minimum, Title III should: stipulate that compliance with mandatory government safety standards is conclusive evidence that a manufacturer took reasonable care in designing a product; limit the amount of punitive damages that may be awarded in a single action—as well as the amount that may be awarded in multiple actions; and eliminate joint and several liability coupled with a comparative fault standard.

CONCLUSIONS

There is a crisis in the civil justice system in America. Evidence of the need for reform can be seen daily across the country as governments—federal, state and local; the professions—including doctors, accountants and architects; and businesses of all sizes are suffering under a tidal wave of litigation.

The unique interstate commerce concerns of product manufacturers and product handlers and sellers demand reform at the federal level. America's businesses and nation's consumers are paying the harshest price for the current tort system. The increased cost of insurance coverage is passed onto the consumers in higher prices and also through the reduced availability of products and services. Already, astronomical legal settlements and escalating insurance premiums have forced more than a few companies to drop product lines or, in some cases, to go out of business altogether—with the resulting loss of American jobs.

The current system is costing American business more than insurance premiums. There is no greater disincentive to the innovation and technological advancement required to compete in the world marketplace that the threat of incalculable liablity. All of us—manufacturer and consumer alike—want safe products and a fair system of compensating those with rightful claims. The current product liability system has been woefully inadequate at providing either.

The member companies of the Business Roundtable are anxious to work with this Committee to achieve meaningful federal reform of the product liability system and to explore alternatives which might reduce the cost and delay of product liability dispute resolution.

Senator KASTEN. Thank you, Mr. Head.

Our next witness on this panel is Mr. Martin Connor, representing the National Association of Manufacturers.

Mr. CONNOR. Thank you, Mr. Chairman. As you said, I am in real life, Washington Counsel for General Electric Co. and I am here today testifying on behalf of the National Association of Manufacturers.

I understand the assignment that has been given to this panel is to discuss the options, the choices which the subcommittee faces as it attempts to improve and perfect the bill that is before you.

I think everyone who has spoken here today would agree that the product liability system serves two functions. It provides incentives for safety and it compensates persons who have been injured.

You remember last June, George Priest, Prof. George Priest told us that is the great paradox and problem of the system, reconciling these two objectives.

S. 1999's great virtue is that it separates out these functions. It establishes one track, title III, serving primarily the safety function, and another, title II, serving primarily the compensation function, and permits a claimant to choose between them.

The question I want to ask before looking at the subcommittee's options is how well title II succeeds in optimizing for compensation. To optimize a product liability system for compensation, we would establish processes which permit prompt adjustment of claims, with little controversy and with minimal transaction costs.

Such a system will look and act much like first party insurance, much like our familiar health insurance policies. The subcommittee's attempts to devise such a system started with Senator Dodd's proposed amendment to S. 100. Its alternative compensation process would have made a manufacturer liable for any injury caused by a product, so long as it was being used in the intended way and the injured person was not grossly negligent.

The Dodd process would, in most cases, have met our requirements for an effective compensation process, would have minimized controversy, delay and cost.

The problem is that being basically a no fault system, it would not always have been fair in practice. Unless a manufacturer—I think this is a critical point—unless a manufacturer is somehow responsible for an accident, it is totally arbitrary to hold him rather than someone else liable for its costs.

Title II of S. 1999 meets this objection by substituting for the Dodd no-fault standard a strict liability standard which seems to have been inspired by the California case of ***Barker*** v. ***Lull Engineering.***

Now, whatever else may be said about that standard, it certainly does not give us, in my judgment, a process optimized for compensation. And we have heard this from many witnesses today, and we have heard it, I think, from Senator Danforth.

The disposition of claims, whether by settlement or by adjudication, would involve the same sort of bitter disputes we have today and probably similar transaction costs. Attempting to simplify and expedite the process by imposing deadlines and penalties, as title II does, may only raise again questions of fundamental fairness.

As we have wrestled with this issue at NAM, we have come regrettably to the conclusion that we do not know how to frame a standard of manufacturer liability, a specification of an insurable event which would on the one hand optimize for compensation and would not, on the other hand, in many cases, impose liability arbitrarily.

We are not saying it cannot be done; we are just saying that so far we have not been able to do it. So we are not rejecting title II out of hand. It or some modification of it may turn out to be the best we can do, the best available solution.

NAM would urge the committee, however, to consider carefully the other options that are available to it. We would, for instance, direct the committee's attention to the suggestions which were made last June and were made again this morning by Prof. Jeffrey O'Connell. If an adversarial process cannot be optmized for compensation, then perhaps we can optimize a settlement process.

If a socially desirable result is that most persons injured by products have their medical bills paid and their lost wages replaced, as first party insurance would do, then let's structure processes which provide powerful incentives for both the manufacturer and the injured person to settle on those terms.

I will not bother to repeat Professor O'Connell's proposal. We have heard it again today. NAM, I would say, accepts the basic premise of his proposals; that is, that it is in everyone's best interest that meritorious claims be disposed of by payment of what we have come to call net economic loss.

Since Professor O'Connell testified last June, various interested parties have pursued his line of thought in various directions. One variation on his theme involves what have come to be called high hurdles and low hurdles. A claimant who is reluctant to settle for net economic loss would have to clear a high hurdle in any subsequent litigation, perhaps a very rigorous negligence standard.

A manufacturer who is reluctant to settle for net economic loss might find in litigation that the claimant was coming at him over a very low hurdle, perhaps a strict liability standard.

A second variation which is getting serious consideration would replace these high-low hurdles with economic incentives for settlement. The stakes for the parties would go up, depending on whether or not they had been willing to settle.

NAM is exploring these and other alternatives, including—time will not permit me to go into it—the suggestion that was made this morning by Senator Danforth.

We have seen the proposal of the Business Roundtable. We have not had time to study it carefully, but it again will receive our careful attention. We appreciate the opportunity to testify here today. We are encouraged by the progress that has been made in recent months, and we fully expect this process to end successfully.

Thank you again.

[The statement follows:]

STATEMENT OF MARTIN F. CONNOR ON BEHALF OF NATIONAL ASSOCIATION OF MANUFACTURERS

Good morning, Mr. Chairman and members of the subcommittee. My name is Martin F. Connor. I am Washington Corporate Counsel for General Electric Company, testifying today on behalf of the National Association of Manufacturers.

The National Association of Manufacturers is a voluntary business association of over 13,500 companies, large and small, located in every state. Our members range in size from the very large to over 9,000 small manufacturing firms that each have less than 500 employees. NAM member companies employ 85% of all workers in manufacturing and produce over 80% of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Association Council and the National Industrial Council.

NAM has supported enactment of federal product-liability legislation for many years. Today, however, the crisis in availability and affordability of liability insurance makes reform of the product-liability system more urgent than ever. Steps must be taken now to restore the predictability which is necessary for rational risk management and for rational insurance rate setting. We must take certain costs out of the system so that it will deliver more benefits to claimants than it does to lawyers. We need to take delay out of the system so that claimants will not have to wait years and years for recovery while lawyers fight a war of attrition. We need a more equitable distribution of benefits, so that some claimants are not left with unpaid bills while others hit the jackpot.

I have been asked, on behalf of NAM, to discuss and assess the overall choices which the Committee has before it as it attempts to structure such a basic reform of the product liability system. This can only be done in context. I would propose first, therefore, to review basic principles and to examine the sequence of events which have led up to this hearing.

TWO FUNCTIONS OF PRODUCT LIABILITY

All would agree that the product liability system serves two principal functions: it is intended to provide incentives for safety and to compensate persons who have been injured. Yet as is often pointed out, these two functions are radically different. A product liability system optimized for safety would look very different from one optimized for compensation. Nevertheless, we have expected one and the same system to do both. Professor George Priest of the Yale Law School pointed out to this Committee in last June's hearings on the Dodd and Gorton amendments to S. 100 that the inability of one system to serve both of these functions is a basic reason why the product liability system is in trouble.

The novelty of S. 1999 is that it attempts to separate out these functions. It establishes one process serving primarily the safety function and another serving primarily the compensation function and permits a claimant to chose between them. The great virtue of this approach is that it makes it possible to deal separately with, and to attempt to optimize for, each function of the system. The issue before this Committee is how successfully S. 1999 does this.

OPTIMIZING FOR SAFETY

If we were to optimize a product-liability system for safety, we would first establish a standard which requires both manufacturers and product users to take every reasonable precaution to prevent injuries; we would then allocate the cost of injuries among manufacturers and product users on the basis of their success or failure, relative to one another, in complying with that standard. That is to say, we would apportion the costs of injury on the basis of their respective responsibility for the injury. (It should be noted that the overwhelming majority of traumatic injuries involving products occurs without any responsibility on the part of their manufacturers. If we were to ignore this demonstrable fact, as some critics of product-liability reform insist on doing, we would run the risk of creating a system to punish manufacturers, not to promote safety.) A system which has been designed to optimize for safety by imposing responsibiity and apportioning cost on the basis of ability to prevent injury is necessarily going to have a number of characteristics: it will be highly contentious; it will be slow; it will involve substantial transaction cost. There is no "quick and dirty" way to assign responsibility for accidents accurately.

Title III of S. 1999 is a conscientious and moderately successful attempt to define such a process. Its most notable shortcoming, and it is a very fundamental one, is that it fails to set uniform standards for apportioning liability between claimant and defendants and among defendants on the basis of their comparative responsibility. Whatever problems title III may have, however, seem easily correctible. The more difficult question is whether title II succeeds in establishing a process which is optimized for compensation.

OPTIMIZING FOR COMPENSATION

To optimize a product liability system for compensation we would establish processes which permit prompt adjustment of claims with little controversy and with minimal transaction cost. Such a system would, in other words, look and act as much like first-party insurance as possible. In the best of all possible worlds such a system would compensate persons injured by products as efficiently as we are compensated today for illness and accidents under our health and accident insurance policies. The development of title II of S. 1999 has been a year-long search for just such a system.

The search began with Senator Dodd's proposed amendment to S. 100. Its alternative compensation process would have made a manufacturer liable for any injury caused by a product in normal use so long as the injured person was not grossly negligent. Application of such a standard might have led to controversy over causation and over allegations of gross negligence, but the Dodd process would in most cases probably have met our criteria for an effective compensation process: it would have minimized controversy, delay and cost. The problem is that it would have done all these things too well.

Critics were quick to point out the unacceptable results which would have followed enactment of this proposal. If I were to trip over my son's schoolbag, would I not have a claim against its manufacturer? If I were hit by a wild pitch, would I not be entitled to compensation from the baseball's manufacturer? Our sense of justice tells us that the answer to each of these questions should be no. It is not enough simply to say that the cost of accidents should be internalized in the price of a product. There must be some responsibility for the accident on the manufacturer's part before you may justly impose its costs on him. Otherwise he would reasonably ask "Why me?" Unless the manufacturer were somehow responsible for the accident, it would be totally arbitrary to hold him, rather than some other person chosen equally at random, liable for its costs.

Senator Gorton, in his proposed amendment to S. 100, answered these criticisms of the Dodd amendment by substituting a strict-liability standard. The July 25 staff draft and S. 1999 take the same approach. While there are significant differences among the three proposals, they would each hold a manufacturer responsible for injuries which result from his having placed an unreasonably dangerous product on the market. (Commentators have occasionally described these bills as no-fault proposals. They are not. Strict liability, properly understood, is a fault standard. Proof that a product is defective or unreasonably dangerous is a proxy for proof of its manufacturer's fault.) The standard of liability in title II of S. 1999, sometime referred to as its "trigger," was discussed earlier in this hearing. It calls for risk/utility assessment and places the burden of proof on the manufacturer. Whatever else may be said about it, one thing seems to us to be certain: it would not give us a process optimized for compensation. If title II were enacted into law, the very kind of issues which are contested so heatedly today in product-liability litigation would continue to be contested. The disposition of claims, whether by settlement or by adjudication, would involve the same sort of disputes and similar transaction costs. Whatever title II does, it does not establish a non-contentious process, which is the sine qua non for a product-liability system optimized for compensation.

As we have struggled to devise a substitute for title II's trigger, we have slowly and painfully come to realize that we may not know how to frame a standard of manufacturer liability which would optimize for compensation without, as in a no-fault system, imposing liability arbitrarily. We are not saying it cannot be done: we just don't know how to do it at this point. And if someone else knows how to do this, we at NAM have not heard from him or her.

The lesson we seem to have learned is that first-party insurance is first-party insurance, third-party insurance is third-party insurance and never the twain shall meet. A life-insurance policy will pay its proceeds when the insured dies. A medical insurance policy pays the bills when the insured is ill. A no fault automobile insurance policy pays the repairman when the insured is in an automobile accident. There may, however, be no way to specify a similar "insurable event" which will, without serious possibility of controversy, tell a manufacturer's liability insurer when to make payment to a third party injured in an accident involving the manufacturer's product. Third-party insurance looks at an event and its cause. Payment to the third party is predicated on the insured's responsibility for the event. Whether payment is due is bound to be, in most cases, a litigable issue.

ALTERNATIVES

NAM's reluctant conclusion, then, is that it may well be impossible to do what this Committee set out to do almost a year ago: to develop parallel processes optimized, respectively, for safety and for compensation. We seem to know how to do the first, but not the latter.

This is not, or course, to reject title II out of hand. While it may not be optimal, it or something similar to it may be the best we can do and may be preferable to the status quo. That, however, is another subject. Earlier in this hearing another panel examined, from various points of view, the acceptability of the present version of title II's trigger. What I would urge the Committee to do is to consider carefully its other options even as it attempts to improve title II.

NAM has no alternative proposal to present here today. We would, however, direct the Committee's attention particularly to the suggestions which were made to this Committee last June by Professor Jeffrey O'Connell of the University of Virginia law school and which are developed more fully in his writings. If an adversarial process cannot be optimized for compensation, then perhaps we can optimize a settlement process. If the socially desirable result is that most persons injured by products have their medical bills paid and their lost wages replaced, as first-party insurance would do, then let us structure processes which provide powerful incentives for both the manufacturer and the injured person to settle on those terms.

Professor O'Connell's proposal, in its simplest form, is that the defendant in a product liability action be permitted, within a defined statutory period, to "tender to the claimant a commitment to pay the claimant's net economic loss as it accrues" and thereby foreclose the claimant's tort claim. Product Liability Amendments: Hearings before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science and Transportation, 99th Congress, 1st Session 61 (1985). Professor O'Connell's premise is that such a process would produce just results since it is in everyone's best interest that meritorious claims be disposed of on this basis. NAM accepts that premise. In response to those who object, nonetheless, to this proposal, insisting perhaps on a plaintiff's right to chase the pot of gold which awaits a lucky few at the end of the tort system's rainbow, Professor O'Connell would "give the plaintiff the right to turn [the defendant's tender] down but put sanctions on him." Id. at 108.

Since Professor O'Connell testified last June, interested parties have pursued his line of thought in various directions. One set of proposals involve what have come to be called "high hurdles" and "low hurdles." The claimant who is reluctant to settle for net economic loss would have to clear a high hurdle in any subsequent litigation, perhaps a very rigorous neligence standard. The manufacturer who is reluctant to settle would find in litigation that the claimant is coming at him over a very low hurdle, perhaps a strict-liability standard. These "hurdles" are, of course, the "triggers" of title II and title III in another guise. Their formulation might, however, be a simpler matter since they would be by design at opposite poles from one another, intended to discourage litigation of anything but open-and-shut cases. This is an alternative approach to the problems of the product-liability system which deserves careful attention.

A variation of this proposal which is getting serious consideration would replace the high/low hurdles with economic incentives for settlement. The stakes would go up for the player, whether plaintiff or defendant, who is unwilling to settle for what S. 1999 calls "net economic loss." That too is a provactive notion. Its supporters argue that we would do well not to get bogged down in debates over standards of liability.

NAM is currently exploring these and other alternatives. I should point out that we have only recently seen the proposal of the Business Roundtable. At first reading, it seems to incorporate Professor O'Connell's basic proposal into a structured settlement process. We intend to study it carefuly but we are not yet in a position to comment on it.

NAm appreciates the opportunity to testify here today. We congratulate you, Mr. Chairman, and the Committee for your attention to the problem of the product-liability system and for your efforts to fashion a solution to the pressing problem of liability insurance availability and affordability. NAM is confident that the process you have set in motion will be successful. We welcome the opportunity to work with you to that end.

Senator KASTEN. Mr. Connor, thank you.

I would just ask Mr. Head and Mr. Connor, I am assuming your answer would be similar to Pamela Gilbert's answer, but the two of you to comment on the question that Senator Danforth raised in terms of the comparative responsibility issue.

Do you think that the comparative responsibility issue has to be dealt with, No. 1? And No. 2, do you think it ought to be equal in section 3 and in section 4—excuse me, section 2 and section 3?

Mr. HEAD. The answer to the first question is I think it should be dealt with in 3. It is not needed in our version of title II since we get rid of the question of who is at fault and deal with the question of tendering net economic loss. In other words, we get people into that system.

Actually, joint and several tends to be a penalty-type provision. Its greatest history is in the antitrust law where it is used as a hammer in order to get settlements in antitrust cases. We think it should be dealt with in title III.

Senator KASTEN. Mr. Connor.

Mr. CONNOR. Joint and several liability, as said this morning, is the major problem. It is not dealt with in title III and appropriately could be dealt with in title III. I should think that putting in joint and several restriction, a comparative responsibility provision, or a restriction on joint and several liability in title III and not in title II might provide a powerful incentive for claimants to go into title II.

Senator KASTEN. Do you have anything to add to the previous comments?

Mr. GOFFMAN. Just a very quick comment again, that again since we prefer a title II system that really creates as clear and direct incentives for settlement as possible, we are inclined to be really cautious about what we put into title III, since that is going to continue to be a source of incentive and cross-incentive to manufacturers.

So even thinking about inclusion of changes to the law of joint and several liability should be weighed in those terms as well.

Senator KASTEN. Senator Danforth.

The CHAIRMAN. I am very happy that this panel appeared at the end of the day, because you have given fresh hope. You know, it is interesting, the Public Citizen/Congress Watch witness and the Business Roundtable, and the NAM, really I do not think are in that great a disagreement on what the goals are here.

You can correct me, any of you, if I am wrong. But I think that what you are all saying is that the approach is generally right; that what we would like to do is to get to some claims system which is workable and which is simple, and which people could understand without being bogged down in more and more litigation growing out of the claims system.

Do you think we could work that out? Do you think that this is doable in a way that is—and let's face it, Mr. Goffman is not exactly on the same wavelength I would guess generally as Mr. Head and Mr. Connor—but don't you think that it is possible that we could put together something that is sensible?

Mr. CONNOR. I have always thought so, of course, and we have been working hard for the last year with Mr. Goffman and with others toward this objective.

Mr. HEAD. I thought so, to the extent that I got my group together and said give me one, and we are going to submit it to you. So we are willing to go even further.

The CHAIRMAN. Well, I think that is terrific.

Do each of you agree that title II in this draft in S. 1999 is too complex and is too given to more and more litigation?

Mr. CONNOR. Yes, I have come to that conclusion. Yes.

Mr. GOFFMAN. Yes, I agree with that as well.

Mr. HEAD. Yes.

The CHAIRMAN. Do each of you agree that what we want is an alternative system where people who are injured by a product, if they have used the product in the appropriate way—I mean you do not want somebody to recover who has tried to shave with a chain saw.

But do you agree that it is a general principle that if somebody is injured by a product and the product has been used in an appropriate fashion, and that person could not have easily prevented the accident, that there should be recovery of net economic loss?

Mr. HEAD. Yes. And that is what we think ours would do.

Mr. CONNOR. Senator, I think what you are proposing is very similar to something we have been examining and something an earlier witness mentioned, and that is a section 2 test which would say that a manufacturer whose product causes an accident will be liable for the damages unless and you have specified a number of unlesses.

Now, identifying those unlesses, will take some work, but I think it is feasible.

The CHAIRMAN. Now, Mr. Goffman, at the end of your testimony you were beginning to spell out what you thought, but could you elaborate, I mean how do you think that this should work?

Mr. GOFFMAN. I think preferably just in terms of developing the ideas as clearly as we can, the first thing we would like to do is to look at the current system and figure out where the incentives lie to settle. Since I think that there are incentives on both sides to settle we should perhaps use a system of monetary rewards or monetary penalties to encourage, first, manufacturers to settle or just make offers of settlement, and then to require in effect that if a plaintiff is going to turn down such an offer to go ahead and bring a case, then he has got to be reasonably sure at the end of the case that he is going to have either proven vast wrongdoing by the manufacturer or he is going to recover a tremendous amount more than the manufacturer originally offered.

Otherwise, he should be subject perhaps to a certain offset for having made all the parties and the court go through that process in the first place. The effect of that is that victims turn down settlements in 1982, litigate it for four years and end up basically with the same amount at the end, and particularly lawyers like that, are not going to stay in business very long.

Again, what recommends that as a first step is that it is the system we know the best, the system we have to do the least to to get the most predictable results.

And, Senator, on the whole idea of settlement——

The CHAIRMAN. I want to put aside the question of toxic substances because we are going to have a whole hearing on that

Do you agree that the basic thrust of our intention should be title II and the trigger mechanism of title II, maybe looking at the rewards and penalties system, as Mr. Goffman suggested? Do you think that that is really the big bone of contention and that if we could work that out we have pretty clear sailing?

Mr. GOFFMAN. Can I express a reservation about title III just in the context of——

The CHAIRMAN. I was just getting upbeat.

But go ahead.

Mr. GOFFMAN. To borrow an expression of a colleague of mine, title III is dropping a pretty big rock in the pond in the sense that we perceive it as including a lot of prodefense changes which we assume are going to upset the balance of incentives. In other words, title III is a counterweight to settlement on the part of the set of incentives that operate on the manufacturer. And that is something I think we cannot be too cavalier about.

The CHAIRMAN. Well, I want to thank this panel. Did you have something more you wanted to say, Mr. Connor?

Mr. CONNOR. I just wanted to say one thing. I would answer your question yes. And I would say, just to end on a totally upbeat note, that I would expect from what I see and from what we have heard in this room today, that within the next few weeks the subcommittee is going to have several proposals before it, improvements over or substitutes for title II, and that your challenge is going to be to pick the preferable one of those.

Mr. HEAD. Since we are first out of the box, I would recommend that you take a look at us.

The CHAIRMAN. Don't worry.

Well, I want to say this. I really am just repeating myself. I really believe in what we are trying to do. Obviously when you are changing the system, people who have concerns on both sides are going to say no, we do not like this, and they are going to point to the changes that are made, but there has to be a balancing process. Nobody is going to be satisfied in toto.

The question is going to be whether it is going to be a net plus or a net minus.

But, Mr. Chairman, I appreciate the hearing and I do hope that everyone who has been here and everyone in the audience is going to be helpful in trying to move the process forward.

I want to point out that while I absolutely believe in what we are trying to do and while I think S. 1999 is a darn good work product, there is nothing that is locked in in S. 1999; there is nothing as far as I am concerned that is locked in.

It is a continuation of a process. I also want to add that I hope that the process does not just drag on forever. I mean eventually, and I would hope in the near future, we will have something which everybody can at least choke down.

So I would hope that we are going to mark up a bill sooner or later.

Thank you, Mr. Chairman.

Senator **Kasten**. Senator, let me just say that without your leadership and help, we would not be even close to something that everyone can just choke down. And I think that is where we are heading.

I would like to thank all the witnesses.

Our next hearing on the product liability reform and S. 1999 and its elements will be on March 11. The hearings will remain open for 2 weeks for additional statements and questions. I am encouraged by the effort that is being made to achieve our goal, and I thank all of you again for participating in our hearing.

The hearing is adjourned.

[Whereupon, at 1:20 p.m., the hearing was adjourned.]

PRODUCT LIABILITY VOLUNTARY CLAIMS AND UNIFORM STANDARDS ACT

TUESDAY, MARCH 11, 1986

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SR-253, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN [presiding]. Today the Consumer Subcommittee holds its second day of hearings on S. 1999, the Product Liability Voluntary Claims and Uniform Standards Act and related reform proposals.

At today's hearing, we will hear from four panels of witnesses. The first two panels will examine the provisions of S. 1999 concerning the claims system treatment of toxic harm caused by long-term exposure to products. The third panel will address issues pertaining to the proper procedures for the alternative claim system. The final panel will discuss the record retention requirements of the bill.

As we learned at our first hearing on S. 1999, this draft of product liability reform legislation raises many difficult issues that still must be resolved. Alternatives to many provisions of the bill may have to be considered; moreover, hard decisions and compromise will be required of all of us if we are to come up with viable product reform legislation.

Now, we very much appreciate the witnesses who are here today. Let me apologize in advance for what might turn out to be a problem. A number of members of this committee including myself are members of the Senate Budget Committee. We have started marking up the budget. Unlike the Commerce Committee, proxies are not honored in the Budget Committee. That means that we have to be there when the roll is called. The roll is going to be called, I think, this morning, and so I am hopeful that I can get somebody else to fill in at the necessary time to chair this meeting.

I have a statement Senator Hollings would like to have included in the record.

[The statement follows:]

OPENING STATEMENT BY SENATOR HOLLINGS

Mr. Chairman, today the Consumer Subcommittee will again focus on S. 1999, a new approach to the issue of federal product liability codification.

S. 1999, introduced by Chairman Danforth, seeks to combine an alternative compensation system with changes in the rules of tort. We will hear today from witnesses who will discuss their views on the Title II claim system of the bill, and particularly the procedure for determining causation for toxic harm contained in Title II.

In addition, we will hear witnesses discuss their views on the "record retention" requirements of S. 1999.

I look forward to reviewing this testimony and I am anxious to learn the views and perspectives of today's witnesses.

The **CHAIRMAN**. It may be that this hearing will be interrupted from time to time, and I do want to apologize for that in advance. It would be very helpful to the committee if the witnesses could keep themselves to their allotted times, and do not even ask for permission that your full statement be part of the record. It will be part of the record. If you just summarize your comments.

The first panel members are, Dr. Edward Burger, director, Institute for Health Policy Analysis, Georgetown Medical Center; Lawrence Novey, Kaye, Scholer, Fierman, Hays & Handler; Prof. Donald Elliott, Yale Law School.

Dr. Burger, would you like to proceed, please?

STATEMENTS OF DR. EDWARD J. BURGER, JR., DIRECTOR, INSTITUTE FOR HEALTH POLICY ANALYSIS, GEORGETOWN UNIVERSITY MEDICAL CENTER; LAWRENCE B. NOVEY; AND E. DONALD ELLIOTT, YALE LAW SCHOOL

Dr. **BURGER**. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, I am pleased to have an opportunity to appear before you to consider the difficult questions posed by demands for financial compensation for disease and disability. I am a physician and scientist. I hold a degree of doctor of medicine from McGill and an additional doctoral degree in one of the basic medical sciences, physiology, from the Harvard School of Public Health.

For nearly a decade as a member of the faculty of Harvard I engaged in research and teaching at a department dedicated to understanding the fundamental biological mechanisms underlying environmentally caused disease. Additionally, I held a joint appointment at Harvard in the Kennedy School of Government and Science and Public Policy.

During the early 1970's, I served on the staff of the President's science adviser and the former Office of Science and Technology and the Institute of Health Policy Analysis, Georgetown Medical Center.

Trained as I am in science and preventive medicine, I can only ally myself with those sentiments favoring prevention of disease and disability. I must also declare my respect for basing important policies and individual judgments, such as those concerning compensation, on a body of recognized and valid fact.

A prominent concern in the case of S. 1999 is for disease—as opposed to injury—attributable to or associated with defective products or environmental settings. The most difficult public policy questions turn around disease entities characterized by multiple contributors or causes, by long or very long incubation periods and which are chronic in duration.

Difficult challenges arise both when attempting to determine the potential contribution of a particular chemical or physical agent to human disease in general and when trying to determine the importance of a particular exposure for an individual claimant. If one is truly to base judgments on a body of fact, one must observe certain important features of scientific material, and important criteria for judging causation between exposure and disease.

The Institute for Health Policy Analysis has sustained a lengthy inquiry into the use of scientific factual material for compensation decisions and the rules for establishing causation in the law and in the sciences. A research paper, entitled "The Dilemma of Toxic Torts," reviewed the criteria for determining causation in the law and in the sciences.

A subsequent report just published, deals particularly and extensively with the use and interpretation of scientific factual material by the courts. This report presents the findings and recommendations of a distinguished panel of persons who sat through and considered the deliberation of a group of judges, lawyers, from both the plaintiffs and the defense bars, legal scholars, scientists, representatives from the insurance industry, from industry, and from Government.

That report found compensation decisions often are not based on scientific concepts of causation. Science and the law diverge in court settings and this divergence or relaxation in the approach to causation, it was judged, contributes to the expansion of the awarding of compensation.

I would like, with your permission, to offer these two reports to be placed by reference into the record, Mr. Chairman. The second report suggests the prospect of some betterment from efforts to make the court work more carefully with science. However, a major improvement, it is felt, would only come from fundamental structural reforms of the present compensation and litigation processes, including incentives to settle the issues outside the courthouse.

If it is in the national will to be selective in compensation via a judgment of causation, the use and interpretation of medical scientific information, and a determination of causation must be made much more rigorously and consistently lest confidence in the process be further diminished. Because of the inevitable uncertainties in scientific material, and because there will always exist areas of honest disagreement among scientists and among physicians, their judgments must be made in a collective fashion rather than as individual experts in adversary proceedings. The results of their deliberations should be kept out of the adversary process. This is in fact the essential pattern adopted in the United Kingdom.

Let me turn to certain aspects of the bill, S. 1999.

One, the general concept of an incentive for expedited settlement, avoiding litigation, is very attractive.

Two, the general concept of a national toxic health effects panel is meritorious. A judgment of risk on toxic harm, again, should be made collectively and by a panel of experts.

Three, the guideline or threshold of harm of an increased incidence of disease of 30 percent, however, I believe, is unscientific, inappropriate, and, I believe, probably unworkable.

Four, the panel members should not be selected from among Government employees, but rather from experts chosen from outside the Government. In this instance, the first staff draft of this bill, I think, was frankly an improvement over its revised version.

Five, there is some confusion over the terms of reference for the panel. It is supposed to deal with generic issues, but it can be invoked in response to a petition from a claimant. This will quickly, I believe, overwhelm the panel with work.

Six, at least for the category of occupational exposures I would urge an arrangement which builds on State level workers' compensation processes, enhances the medical and technical judgments at that level, and provides for overall guidance and perhaps appeal of technical issues to the panel.

I think that we may well find that the proper social policy is to provide fair compensation for illness without attempting to be selective as to fault or cause or other attribution. New Zealand has sustained a no fault process for injuries for many years.

In Canada, a parliamentary commission recommended that a comprehensive disability insurance plan be instituted on what could be described as a no fault basis. A Federal provincial task force has been at work to design such a program in which causation would be removed from consideration.

Fundamentally, much of the present concern for compensation and the derivative issues of the role of the tort law or the cost or availability of insurance is based upon a strong public perception in some quarters that the environment has become filled increasingly with risks to health.

Second, it has been repeatedly said that there exists a backlog of disease, disability, and premature mortality attributable to something for which, in the name of equity, compensation should be paid. I believe that with some urgency we need to determine more carefully what the importance of the environment, both the occupational and general community environment, is to the human disease burden.

The CHAIRMAN. I am going to have to ask you to wind it up, Dr. Burger.

Dr. BURGER. If prevention of ill health is truly our goal, it is important to take account of contribution of hazards both voluntarily and involuntarily assumed. I would be delighted to make resources available to you, and would be pleased to offer any additional assistance to this committee that might be useful. Thank you.

The CHAIRMAN. Thank you.

Mr. Novey.

Mr. NOVEY. Thank you, Mr. Chairman.

My testimony today is based primarily on the panel study of causation and financial compensation, conducted by the Georgetown University's Institute for Health Policy Analysis, that Dr. Burger has already introduced. I prepared the report serving as reporter for the study panel. I have also been involved in developing plans for compensating persons exposed to agent orange and asbestos.

The Georgetown panel found fundamental shortcomings in our product liability system when it comes to toxic chemicals, problems thoroughly described on the record collected by this committee. The panel also recommended consideration of a broad range of possible reforms, including the creation of new compensation systems, and it identified four basic objectives for such compensation programs. When measured by these objectives, S. 1999 emerges as an important step forward, but problems still remain to be solved.

The first objective of a compensation program is that eligibility rules should be relatively unrestrictive, so that persons injured by toxic exposures do not go uncompensated. Because of scientific uncertainty about causation, the only way to assure that true victims are covered is to make more people eligible than were actually injured by the chemical.

The second objective is that payment levels should be lower than under the traditional tort system. Thus, even with more people getting compensated, a company's total costs for compensation should not be out of proportion to the total amount of injury that the company's product actually imposed.

Consistent with these objectives, title II of S. 1999 would apply less restrictive rules of eligibility than the tort system, and would pay less than traditional tort damages. However, there is no telling whether the total amount a company pays under title II might be far higher or far lower than the total amount of injury actually caused by the company's product.

Without more assurance on this issue, companies and consumer groups will both have a legitimate basis for concern about S. 1999.

The third objective is that individual claims should be resolved through administrative decisions or private settlement. Title II does include incentives to encourage settlement of claims, but the legislation must also include adequate incentives for claimants to seek compensation under title II rather than seeking the larger tort awards by suing in court under title III.

Since title III adopts the fluid and often lenient approach to causation that judges and juries now apply, however, a lawsuit under title III may be the more attractive remedy even for marginal claims.

The fourth objective identified for a compensation program is that determining causation in individual cases should be simplified or avoided. This can be done by adopting an easily applied test of causation or by offering compensation to a class of persons without individual proof of causation.

Title II states that a toxic risk is compensable if there is a 30-percent increase in disease, but this rule raises as many questions as it answers. For example, are definitive statistical studies of actual human populations required? At the same dose of exposure as the claimant suffered? With the same age and gender and consumer habits, and so forth, as the claimant? May aninal studies be used to support, or oppose, a claim of causation? What if clinical evidence shows that some factor other than a toxic agent was the actual cause of the claimant's disease?

Depending on answers to questions such as these, the rule in S. 1999 can be lenient or strict or anywhere in between.

Would S. 1999 be improved by including detailed rules on how to prove causation? Unfortunately, I do not think it can now be done. We are just learning how to design a custom-made compensation program for an individual toxic tort problem such as asbestos or agent orange. The issues are not well enough understood to draft precise legal rules on causation that apply for all different kinds of exposure.

In a generic bill like S. 1999, one possible solution might be to delegate responsibility for developing specific causation rules to an expert panel. This would not be a purely technical panel like that now envisioned by the bill. In the absence of a tightly drawn legal mandate, a panel that develops its own causation rules must have the broad expertise and authority to balance the sharply conflicting scientific, legal, social, and economic objectives inherent in designing any compensation program. The process also must be carefully designed to assure that the panel does not become a procedural bottleneck.

Such use of an expert panel also raises serious social and political questions. Objections will be raised to taking the power to make controversial decisions away from the grassroots juries and judges, which people know and trust, and shifting that power to a centralized body of Government experts.

In closing, I would be happy to assist this committee and its staff in any way you think would be helpful as you continue the difficult and important task of improving the way society compensates persons injured by toxic chemicals.

The CHAIRMAN. Gentlemen, thank you very much. I do not know whether Professor Elliott is here. I am told that he came in this morning and he is coming in from the airport, so when he arrives we will hear from him at that point.

Let me ask you, gentlemen, I read an article from the National Journal, I think, last October or November about the problem of toxic torts, and the article spelled out all of the problems and the differing points of view about what should be done about it.

One general conclusion in the article was that most people now who have thought about it both from the standpoint of plaintiffs and defendants, while they are really not happy with the tort system, would rather stick with it than to get into some kind of claim system.

Do you agree with that? Do you think that while it is a difficult problem, we do not have a sufficient bead on the answer to be confident in moving forward and therefore we should put it on the back burner for a while?

Dr. BURGER. Well, I would offer a personal view. To the extent, first of all, that the resort to the courts and all that follows from that contributes to what is now called the insurance crisis, I do not see how the country in fact can wait to do something about the issue.

The evidence I have seen suggests that there is certainly a linkage and perhaps a substantial linkage between the call-upon relief through the courts, the number of fairly large jugdments that are offered, and the inability to purchase insurance or the availability of insurance only at very high rates. That is one thing.

Second, I am persuaded that the court is no place to settle issues with high technical content, which many of these are. Former Judge Marvin Frankel wrote several years ago in a Law Review article that the truth only follows out of court process by accident. In this case I think it becomes important if in fact there is to be a factual base for the decisions that we are talking about. That means, as I suggested in my testimony, that I think there have to be other arrangements for adjudicating issues if one is to rely heavily upon a body of fact.

The CHAIRMAN. Excuse me, Mr. Novey. Do you think we should proceed, or put it on the back burner?

Mr. NOVEY. I think that no specific proposal may yet have been developed that all parties can rally behind. However, people from many different sectors have expressed great dissatisfaction with the present arrangements. Our present tort system imposes very serious difficulties, by making insurance unavailable, by interfering with the ability of companies to provide certain products that are important to our society, and by failing to provide compensation promptly and fairly to many people who are injured. There is widespread dissatisfaction.

We have learned a great deal from designing and implementing compensation programs for specific major toxic tort problems. For example, considerable progress has been made in developing methods to resolve asbestos claims. The agent orange case is nearly resolved and compensation payments should soon be made to individual veterans. So we should continue, where we can, to custom design programs for specific major tort problems, and we should continue to seek general principles that can be applied to broader classes of chemicals and products.

The CHAIRMAN. Dr. Burger, in these toxic questions, will it always be the case that there is going to be some question as to the exact cause of illness or death? That is to say, plaintiffs are not statistics. They are people.

Let us say that Joe Blow is sick, and he has spent 10 years of his life working in proximity to some toxic substance, and the illness he has is the kind of illness that would be caused by the toxic substance, but a lot of people in the population get the same illness anyhow, and Joe smokes.

It will always be the case that it is going to be very problematical whether this particular individual was or was not made sick by the toxic substance.

Dr. BURGER. My short answer is absolutely, but the disease entities that will be the difficult challenges, the ones that provoked your legislative endeavor in this case, are typically those that may have several contributing causes. Nailing down a cause, in fact, means nailing down the particular contribution of the agent that you are interested in among perhaps several others.

Your example of the worker who smoked and was also exposed to a portfolio of other things is not atypical.

The CHAIRMAN. Do you think it is reasonable to try to assess some percentage probability—50 percent, 70 percent, 30 percent that this disease was caused by this illness and to award damages on that basis?

Dr. **Burger**. I do not if you attach a number to it. I think for the very reasons that you have suggested yourself, I think that either one should elicit the best judgment of a group of expert people on the subject of what was the probable cause of that agent to that man's disease and rest upon that or seek an arrangement which simply moves away from the causation entirely.

The **Chairman**. How could you move away from causation entirely?

Dr. **Burger**. Well, I cited the example of Canada, which is wrestling with exactly the same problem right now, and New Zealand, which put in place some years back a program of compensation for injury, cause notwithstanding. Canada is considering the same thing for itself right now, because of the very dilemmas you are talking about.

The **Chairman**. Just health insurance?

Dr. **Burger**. Well, there are three components to monetary claims. One is for direct cost for health care. That is certainly one of them, and maybe the most important one. The second one has to do with lost wages. That is the one that is most contentious right now in Canada. The third one is——

The **Chairman**. Your idea is to just spread the risk throughout the whole country, though?

Dr. **Burger**. Well, I think that ought to be considered.

The **Chairman**. And then there would be no inducement at all other than complying with, say, FDA regulations or something, but under that idea there would be no inducement at all to improve safety.

Dr. **Burger**. You are asking me perhaps about the effect on deterrence of the very process that we now live with. I am not sure that it exercises deterrence in spite of the rhetoric in its behalf. In fact, in the report that I cited, there was a strong suggestion that perhaps deterrence is perverse in some cases. That is, the court process and its awards lead to what the panel called overdeterrence. The fact that the loss of vaccine manufacturers in this country is perhaps the most prominent example right now.

The **Chairman**. Do you think it makes sense, Mr. Novey, to try to assess probabilities and percentages and use that as some sort of key to recovery?

Mr. **Novey**. I think that legislative language can and should be developed to give guidance to scientists and other experts, to tell them what degree of certainty regarding a possible causal relationship is definitive enough to warrant an award of compensation. However, I do not know whether such guidance should be expressed in percentage terms.

The **Chairman**. But let me ask you this. Is it not true that scientists always deal in percentages? Don't scientists always deal in statistical probabilities. There is a statistical probability that a person who is 50 pounds overweight will have heart disease, is that not correct? Is that not the stuff that medical journals are made of?

I am not the doctor, Dr. Burger, but I think that is correct, that doctors do assess probabilities. They tell a patient, for example, one possibility is that you have such and such an operation. If you have that operation, your chances are 90 percent that you will be better. Do they not do that?

Dr. Burger. Absolutely.

The Chairman. Why could they not give the personal injury system the same sort of advice?

Dr. Burger. Well, let me answer in two ways. One is that if in fact they do their job well, they would have done that. Asbestos is a good example where at this point one can say something about the relative contribution of cigarette smoking and the relative contribution of asbestos exposure.

But I think to write into the law in statutory terms a specified threshold or guideline of that sort as governing will not aid the process that you are talking about, and that is what I am referring to.

Mr. Novey. Mr. Chairman, perhaps this is the perspective of the lawyer rather than the scientist, but I would suggest that some statutory guidelines should be included to tell the scientists and other experts how certain they should be about the existence of a causal relationship to warrant the granting of compensation. However, I do not know whether that guidance should be expressed in percentage terms or in some other sort of terms; that conclusion, I think, should arise from discussions between scientists and lawyers about how best to express the guidelines.

The Chairman. I do not know how else you could express it. It just does not seem to me that there is an alternative. Maybe there is, and I suppose you could—how would you measure a degree of admancy or enthusiasm on the part of whoever is taking a position? I mean, unless you say, in other words, what is the likelihood that this guy's disease was caused by this particular substance, I do not see how you would measure it other than somebody saying, well, it is 70 percent likely, 10 percent likely.

Dr. Burger. Mr. Chairman, I guess I would strongly propose that you leave guidance in the bill, that is, in qualitative terms, but without percentages, and leave that to a group of experts to make the judgment that you want them to make. Is in fact this a risk? Did it cause harm? Was it a contributor to his illness, or was it a contributor to his premature mortality, but not try to specify a number.

The Chairman. OK. Professor Elliott, I am glad you are here.

Mr. Elliott. I apologize. I put all the blame on Pilgrim Airlines. I apologize for being late. I would also like to address this issue of the 30 percent over background, and I have an alternative way to approach the issue that I would like to suggest for your consideration, Senator.

First of all, let me say that the difficulty I have with this 30 percent over background standard is, it seems to me that in most of the situations where the chemicals that you will actually deal with, unlike something like asbestos or vinyl chloride or DES, which have relatively clear relationships to relatively rare diseases, I think in the practical circumstances that someone would have to deal with, you are dealing with a much more inconclusive situation in terms of what science can actually say.

I thought of some examples. For example, trichloroethylene, which has been used as a decaffienator, as common in household cleaners, methylene chloride in paint strippers or aerosols, and in those situations typically you will not have any epidemiology at all or you will have very little, and it will be quite inconclusive.

So, as a practical matter, what one would typically rely on are animal test data toxicology where you have high levels of exposure to a relatively few animals, and the difficulty comes in terms of relating that animal test data to the actual exposure levels that human beings have. As you are well aware, the usual method is to try and fit curve and extrapolate down to the exposure levels that people actually have.

There are a lot of difficulties in doing that. There are a number of different ways to fit the curves, and it can make a tremendous difference. To try and give an illustration, there was recently an article in Environmental Science and Technology which actually does this process for trichloroethylene, a very common industrial chemical, and depending upon the different methods, the different models for fitting the curve that are used, you get a range of uncertainty that is equivalent to not knowing whether one has enough money to buy a cup of coffee or pay off the national debt. That is how large the uncertainty is, explaining the same test data, depending upon which model you use, and so I think the difference between 30 percent probability or 50 percent probability is actually going to be swamped by the levels of scientific uncertainty.

I would also note that in that circumstance the provision in section 108 that opinion testimony has to be supported by peer reviewed science is a partial solution but certainly not a complete solution, because a very, very broad range of uncertainty could, I think, meet that standard.

Well, the typical approach in the tort system is simply to leave the loss where it falls. If the 50-percent standard is not met, and I am certainly sympathetic to the provision in the bill that reflects the notion that that burden of uncertainty following on the claimant is unfair, it seems to me that the real problem is not simply a high degree of scientific uncertainty, but that we have got a large number of very small risks, most of which would not be compensated under the 30-percent standard if it were applied accurately, but because there is a very strong norm in the community to compensate people who have been exposed to hazardous substances involuntarily, I think there is a tremendous incentive, no matter what the formal law on the books, for any institution to try to compensate people in some way.

What I would propose, and I really have two different approaches that I would propose for your consideration, the first would be a system of three tiers, which is really modeled on the approach that a lot of regulatory agencies use. I would say that if the science panel can estimate the risks as being less than one in a million lifetime risks of death, that that should be considered a de minimis risk, and there should be no recovery.

On the other hand, in an intermediate category, say, between a million and 10,000 lifetime risks, the bill ought to provide some kind of defined benefit, on the order of, let us say, $5,000 or $10,000 if somebody has been involuntarily exposed to a risk of that order of magnitude. On the other hand, between 1 in 10,000 and 1 in 3, perhaps a higher category, say $25,000 could be arrived at.

There are a number of different ways to go about arriving at the amounts of compensation. Judge Posner has suggested that we use an estimate of the amount of life, of the amount of years of life expectancy that are being reduced or whatever, but I think the important point is to recognize that in order to be effective and not distort the system in toto, there has to be some provision made to deal with the large amounts of scientific uncertainty, and the fact that most of the time you will be dealing with very, very small risks, and you need to provide some kind of compensation for them.

The approach that I have suggested as tort scholars will recognize is kind of an adaptation of the New Zealand torts plan where you have a series of scheduled benefits, but it is adapted to these different large risk categories that are relatively well established in terms of U.S. regulatory practice, and I guess my point is, I think that science can deal with the question of whether or not we are in the range of less than a million or we are somewhere between a million and 1 in 10,000.

I do not think it can actually speak to the question of 30 percent. I think that is asking something that is much too precise, and the result is simply going to be, I think, to greatly distort the system.

Just one final remark, and that is, I think that the National Toxic Health Effects Panel is an extremely good idea, and something that, if nothing else was done, I think it would be important to set that up and let it actually operate and see what kind of data it would be able to produce.

I think a lot of support for the general approach in the bill would be marshalled if you had something like that actually up and running, because I think a large part of the expense and unpredictability of the present tort system results from the need to litigate the same scientific issues over and over in front of lay judges and juries who are not very good at dealing with those kinds of questions.

So, I am in sympathy with the approach in terms of the panel, but I think the 30-percent standard is not very likely to be practical in terms of the realities of the kind of information we got.

The CHAIRMAN. So what would you do if you were in our shoes? You would set up a panel, and what else?

Mr. ELLIOTT. I would set up the panel, and I would set up the system of tiers. Whether or not you use 30 percent or 50 percent seems to me to not be terribly relevant because that difference is going to be swamped by the degree of scientific uncertainty in any event.

I would also make the findings of the panel presumptive rather than conclusive, that is, treat them in the way that one treats a master's report, because I think they are going to be constitutional problems unless you either provide for a judicial review of the panel's determinations or you simply give them a rebuttable presumption of validity like a master's report in front of the jury.

The CHAIRMAN. Would that not just open the whole thing to a big factual dispute and trial?

Mr. ELLIOTT. I think not, not as a practical matter. One of the experiences, as I am sure you are aware, under Superfund and also under a lot of the ADR experience is if you actually get a reasonably respectable liquidation of the uncertainty. Most of the time parties are inclined not to litigate that, because it would be very expensive, but rather to settle around it, and so I think, for example, if after reviewing the science this panel of experts said, the risks for this particular chemical are somewhere between 10,000 and a million lifetime risks, but we cannot say any more precisely than that, I think it would be extremely unlikely as a practical matter that many people would actually try to litigate, but I think it is important from a constitutional perspective to preserve that opportunity, and so my suggestion would be to give that kind of presumptive effect.

I think that is much better than providing judicial review of the panel's determinations, but my expectations would be based upon the experience in other areas that it would be less than 1 or 2 percent of the time that somebody would actually take up the opportunity to litigate those issues.

I think it is very important to bring something like that into effect, even if the results of that process were not given any legal effect at all, if they were simply advisory. I think the experience under the Clean Air Act and many other statutes is that the creation of an institution like that and having it function so that people can actually see how it functions will provide a lot of momentum behind a direction.

The CHAIRMAN. Let me ask you all one more question. Let us suppose, and I know everybody wants to shy away from a 30-percent test, but let us suppose that we are a panel, and let us suppose the panel did in fact determine that there is a 30-percent likelihood that people who have been in proximity to a certain substance will develop cancer.

That is what the panel decides, 30-percent chance that a person who is in proximity will develop cancer. If that were the case, do you think that an individual who makes a claim should recover all of his loss from the cancer, medical expenses, lost earnings, and so on? Should he recover 30 percent? Should he recover zero?

Mr. ELLIOTT. I think the net economic loss approach is a very good and practical approach to that problem. I think as a theoretical incentive matter obviously the answer should be if I am grading an exam the 30-percent probability, but I do not think those approaches are practical. I think if you are going to compensate people, and you are going to say that the risk that an exposure caused their injury is sufficiently significant that the legal system is going to compensate them, then I think you should give them something approaching full compensation, and as I say, I think the net economic loss approach that is taken in the bill, which takes into account collateral sources——

The CHAIRMAN. You pay him 100 percent of his net economic loss?

Mr. ELLIOTT. That is what I would do, Senator.

The CHAIRMAN. How about you, Mr. Novey?

Mr. NOVEY. I would agree that if a person is going to be compensated, the person should probably be compensated entirely; some meaningful level of compensation should be provided, so that the successful claimant will feel vindicated rather than insulted. Some kind of "net" approach, under which the product manufacturer's liability is reduced by the amount of benefits paid to the claimant from other sources, might be the most effective.

For example, under a 30-percent rule, several times more people will be compensated than were actually injured by the company's chemical product. It would create economic distortions, and it would be unfair, if the company were forced to compensate several times as many people as were actually injured by the company's products.

The CHAIRMAN. But it would, I mean, if you compensated everybody, you would be compensating more than three times as many if you had 30 percent funding than were actually injured.

Mr. NOVEY. While all of these persons would be fully compensated, the manufacturer would be the source of only a portion of the compensation. Less than the full amount of economic loss would be paid by the individual company, because much of the loss would be covered by the individual's health insurance and other sources of payment. Furthermore, if we found that this arrangement imposed either too much or too little financial impact on the company whose product caused the harm, then a different compensation formula or perhaps a trust fund approach, possibly including public funding, should be considered.

The causation test used to establish which persons are eligible for compensation need not be the same as the causation test used to impose liability on the manufacturing companies. By using trust funds or using net loss formulas, the amunts of various manufacturers' liabilities can be established through a different process from the one used to establish the amount of each individual's compensation.

The CHAIRMAN. Where does the pricipal of the trust fund come in? I mean, if you had a trust fund, where does the money come from?

Mr. NOVEY. Let me use as one example the case of Japan. Individuals who live within certain areas that have air pollution, and who suffer from certain lung problems, will be compensated from a trust fund. There is no consideration given to whether any particular individual's disease was actually caused by the pollution. The trust fund is funded by contributions from polluting companies within the area, and again there is no attempt to establish a causal link between any individual company and any individual person's injury.

A trust fund approach might also include contributions from public sources if it is concluded that a lot more compensation is being paid than is actually the result of the industry's activities.

The CHAIRMAN. I would not hold out much hope for that latter possibility.

Mr. ELLIOTT. I also have advocated in some of my theoretical writings this idea of a compensation fund, but I certainly agree with the Senator that that does not seem to be politically plausible, and so I think the general approach that is taken in title II of the bill has really very similar economic effects in the sense that one submits a claim to an individual company and then there are rights of contribution, as I understand it, over to the other, to the other companies that might have contributed to the risk.

The CHAIRMAN. That is, if you cannot tell who made the asbestos.

Mr. ELLIOTT. That is right.

The CHAIRMAN. But on the other hand if you have an employee, and the only place that he comes in contact with a toxic substance is at the workplace, and the medical belief or the expert belief is that there is the 30-percent likelihood that coming into contact with a substance causes the cancer, then what?

Mr. ELLIOTT. Well, I understand that. I think it is extremely unfortunate that asbestos is really the model that has come about first, because it is in all of our thinking, but it is absolutely atypical of the problems that we are actually going to confront.

I think the majority of the time you would be in another mode in which you would not be able to identify, and my point was simply that I think that the general approach that is proposed in the bill has effects very similar to the compensation fund, but it is actually more politically plausible, and also I think there is good reason to believe that the administrative costs would be a lot lower because you do not actually have to collect all the money.

All you have to do is transfer the differences between what somebody paid out and what they should have paid out. The main disadvantage I see to this approach is really the political implications of it. The problem is that most of the time, I think probably on the order of about 80 percent of the causal factors will be basically unallocated. They will be what people in the business call the cancers that God causes, and if we place 100 percent of the compensation responsibility on the manufacturers and distributors of toxic substances, we make them pay for the 80 percent that they did not cause.

I think the implication will be simply to further exacerbate the prevailing public hysteria about toxic chemicals by implying that toxics play a much greater role in causing cancer than they actually do. I think the developing science indicates that exposure to toxic substances is a comparatively trivial cause of diseases like cancer, and therefore if we put the entire responsibility on the manufacturers and distributors of toxics, I think we are really misleading the public.

That is the reason that I prefer my approach of scheduled benefits, which are admittedly arbitrary, but I think the approach in the bill comes very close in economic effect to a compensation fund, but I think the difficulty is how you deal with that large percentage that cannot be attributed to anybody.

The CHAIRMAN. Senator Kasten, will you take the chair, please?

Senator KASTEN [presiding]. I just might explain, we are both going back and forth between the Budget Committee. We find ourselves in a position where there are no proxy votes in the Budget Committee, and I am not sure exactly how we are going to work it, going back and forth. I want to just explore the two basic ideas, and this inquiry does not directly affect the subject matter in terms of the toxics here, but what is the number, Dr. Burger, in terms of 1 out of—is it every 10 million people who are going to react to the measles vaccine? The number is something like that.

Dr. BURGER. It is of that order; yes.

Senator **Kasten**. Now let us take that example, and I guess the question is, does the tort system work today? We have got a vaccine which works for the vast, vast majority of people. We have not been able to develop one that is better, and we have a vaccine that, if you will, is serving the purposes of society, but at the same time, how many people are now in the business of distributing the measles vaccine?

Dr. **Burger**. Well, I suggested earlier, Senator, that we had done ourselves a substantial national disservice perhaps by leaning so hard on the—in the name of deterrence and so hard on the issue of side effects of drugs and vaccines in this case, for example, that we relieved ourselves of some lifesaving products in fact, and we will want to revisit that. I think that was a mistake.

Senator **Kasten**. Well, the question before us is not too much different from the question that is before us when we see large numbers of small manufacturers who have made the decision to go without insurance. Now, the next step is that they are going to go bankrupt, and we will lose those jobs, lose those companies, and at that point we will have, if we do not already, have a real crisis on our hands, which people understand.

Now, in the medical area, or particularly the measles vaccine, I think we are seeing—we have gone from several down to one or two and now to one person who is manufacturing and distributing the measles vaccine, and who knows? Next year, 2 years from now, if the system stays the way it is, we will have none. Then we will have no vaccine, and then we will have the disease, and at that point the question really is, how long do we have to wait, both on the product side and on the measles vaccine side. I want to ask also, Professor, how do you view the role of punitive damages in the overall group of settlements on things such as the vaccine? You have discussed the general issue with Senator Danforth in terms of the "economic loss," but lots of these settlements are being made over and above the economic loss. The argument is being made that somehow, even though no one is at fault, someone has been making a profit off of this particular product, drug, vaccine, whatever. Therefore a penalty ought to be assessed against, over and above the economic cost.

There are those who point at the group of people that are making the profits, and argue, and I want you to respond to this, that somehow profits are bad, and therefore they have been making something bad off of this product, and we have got to take some away from them, because they made a bad product. But they have made the product, it seems to me, as well as they possibly could have made the product. Therefore you can make a good argument for the economic damages, but it is very, very difficult to stretch it to the punitive damages as if they ought to be punished for doing what they have done.

Mr. **Elliott**. Well, I agree very much with what you are saying, Senator. I am not much of a supporter of punitive damages for a variety of reasons, and I will try and briefly explain. I just point out that lots of the damages that are technically denominated compensatory are as a practical matter also punitive damages because the jury has been inflamed about the alleged conduct of the manufacturer because they are sympathetic to the victim.

My view is that the real problem with the tort system is that you do not have all the parties represented, that is, all the people who are going to benefit from having a Bendectin on the market are not there in the courtroom. The jury never sees them, and never really sees the effect on them. So my view is that punitive damages are really a regulatory measure that is there designed to send signals and regulate conduct in the future.

I think in the last 150 years we have invented so much better institutions for doing that, despite all their imperfections, institutions that can look more comprehensively at the total society, the total societal costs and benefits of engaging in a particular circumstance, so my view is, we ought to try to regulate, and I agree with the provisions in the bill that the regulatory approach ought to preempt the tort or punitive damages because I think that the regulatory approach gives you a more systematic way of looking at the costs and benefits, and I would say in conclusion that I think the fact that you have regulated a substance ought not prevent somebody who has been injured, despite our best efforts, from getting some compensation in the form of, say, net economic loss, but I am opposed to the large punitive damage victories, which I do not think really benefit anybody other than the trial lawyers.

Senator **Kasten**. I would ask Mr. Novey to respond to the same question, and Dr. Burger.

Dr. **Burger**. I was going to add one other item to what Professor Elliot has said about the trouble with the tort system. I think there is additional trouble with the tort system which crosses my bow, and that is the adjudication of issues with a large amount of scientific and technical information.

I think it is, to repeat myself, I think it is just simply wrong and does not work to try and settle those issues in a court setting, in an adversary process. I have to take mild dissent from my colleague, Professor Elliott, on the issue of whether or not the panel's deliberations and results should be governing or presumptive or conclusive. I think if they are in fact put back into the adversary process in any way, one will in fact be back where he is today, and I think one ought to guard against that.

Senator **Kasten**. Mr. Novey, my time has expired, but I would like for you to just make a brief comment on this brief punitive damages question.

Mr. **Novey**. I would certainly agree that the situation now, where individual courts and individual juries around the country can impose multiple awards of punitive damages regarding the same product, without recognition of the cumulative effect, is not a proper approach, and I agree with Professor Elliott that this is fundamentally a regulatory problem.

I would also like to respond very briefly to the question of vaccines. Some kinds of vaccination are necessary to maintain the public health and may be legally required. If such a vaccinated individual suffers an adverse reaction, we as a society should consider how to assist that individual, as well as avoiding an inappropriate impact on the vaccine manufacturer.

Senator **Katsen**. Senator Pressler, do you have any questions of this panel?

OPENING STATEMENT BY SENATOR PRESSLER

Senator **Pressler**. I do not, but I would like to use this time to make an opening statement regarding an amendment that I have to the bill, if that is agreeable.

The amendment regards the liability of parties. I would ask unanimous consent to place my amendment in the record.

At the last hearing on S. 1999, I expressed several concerns with the bill as drafted, and announced I would be offering an amendment dealing with the issue of joint and several liability. Since that time we have prepared and circulated such an amendment. I have it here. Since we originally had been told that there would be another panel here today, and found out just yesterday that it had been dropped, I ask unanimous consent to have additional statements or letters regarding my amendment placed in the record.

Senator **Kasten**. Without objection, so ordered.

Senator **Pressler**. Since this may be the last hearing on S. 1999, let me highlight my concerns regarding the present application of the joint and several liability doctrine, and explain the amendment's purpose.

As presently applied in many States, the doctrine of joint and several liability has gone far beyond its original common law purpose. Originally, the doctrine was applied when two or more defendants had conspired together in a manner that resulted in injury to the plaintiff. They, were in effect, equally at fault and equally to blame for the harm inflicted. There was no practical way to allocate the relative fault of each party's actions. The doctrine was later expanded to hold responsible all parties involved in causing harm, regardless of whether they acted "in concert" or independent of each other.

This expansion seems to be the result of the old common law courts' reluctance to allocate fault or responsibility. A party was responsible either for all the harm inflicted regardless if there was one or twenty actors—or none of it. In order to avoid the admittedly unfair result of this all-or-nothing rule, the courts allowed the injured plaintiff to collect from anyone who could pay. Logically, the plaintiffs would always go to the defendant with the deepest pocket.

But today the notion that courts are unable to allocate fault is universally rejected. Courts in virtually every State apportion fault in some manner. Although we have the ability to determine and apportion the relative degree of fault, we continue to apply this artificial doctrine of joint and several liability. A party who is determined only 1 percent at fault often is held liable for 100 percent of the damage award. Under the present system the parties causing the harm get off scot free. We no longer punish the wrongdoers. We punish parties for having the deepest pockets. Although most people would agree that this makes little logical sense, I am afraid that in the past many of them thought that this was not such a bad system because it only affected the rich corporations.

Everyone likes to see the injured party recover, and we all like to "stick it" to those big corporations anyway. Unfortunately, that is not what happens. Let me explain the real effects of the current joint and several liability doctrine.

First, it is not only the big corporations that pay the bill. Cities, counties, States, and other local governments are becoming the most popular candidates for joining into a lawsuit. Small businesses who are responsible enough to carry insurance are equally threatened. It is the average citizen who ultimately pays the claim either through increased taxes, loss of service, higher product prices, increased insurance premiums, community business failures, or in some other way.

The point is, as any economist will tell you, that the "big corporations" theory rarely reflects the real world.

Second, the current system discourages safety. Not only does it allow the real culprits to escape liability. It encourages them to act irresponsibly. Why buy insurance? Why worry about delivering a safe product? Just set up a fly-by-night operation or create a phony corporate subsidiary; make all the money you can until somebody sues, pass the buck or declare bankruptcy; and start all over again, making the same unsafe product and endangering the same innocent people.

Third, the present joint and several liability doctrine has been identified as one of the leading causes of skyrocketing insurance premiums not only in the context of product liability but across the board. This is why companies and cities with even the most glowing safety records must pay insurance rates as though they were high risk customers. They not only have to ensure against their own actions, but those of everyone with whom they come in contact or happen to cross their border.

Fourth, those who for all practical purposes the ordinary person would consider free of any true fault are being sued for the sole reason that they have money—or, more accurately, because they have access to money or the ability to extract it from others. Cities are being sued for automobile accidents because their street lights are not bright enough. Balloon manufacturers are being sued because they do not prevent a pilot from flying into a telephone line on a windy day years after he had purchased the aircraft. Motorcycle seat manufacturers are being sued because they do not manufacture a seat that would make passengers stick to it when the motorcycle collided into a car. The list goes on and on. No reasonable person could call this justice. It is an artificial creation of ingenious lawyers who know how to manipulate court rules and know what has to be done to keep up the Mercedes and make the payments on the summer cottage.

I could go on and on with a litany of the problems associated with this doctrine, but I think the point has been made. The innocent are punished while the wrongdoers are rewarded. Safety incentives are being tossed out window. The lawyers are getting rich, and the man in the street is paying the tab.

But I am encouraged by the fact that more and more people are catching onto the game. They understand what is happening and they do not like it. They are demanding change, and this is one area in particular they have stressed. I held two hearings recently in South Dakota on the issue of liability insurance. The need to change the inequities and injustices resulting from the present application—or perversion, if you will—of the doctrine of joint and several liability was the one reform most often and most emphatically urged. This call was not coming from the captains of industry or the "deep pocket" corporations, as the lawyers would like to have us believe. It was coming from the small businessman, the county and city officials, and the ordinary citizens who a few years ago had never heard of the doctrine.

No other country in the world applies this doctrine as it is applied in the United States. In fact, many of them specifically prohibit their courts from following our example. Others simply trust their courts not to get tangled up in this lawyers' fiction. This alone is a telling illustration of our folly in this area.

But with all its inadequacies today, it is clear that the original intent and application of the doctrine was just. It would be a serious blunder to return to the days when a plaintiff was denied deserving relief simply because he or she could not identify which of the neligent actors committed the wrong or that any one party was solely responsible for the harm inflicted.

Under the widely accepted doctrine of comparative negligence, that result is not necessary today and would not be the result under my amendment. The language I am proposing eliminates the joint and several liability doctrine as applied today, but continues to hold all parties severally liable to the full extent of their own actions. In effect parties continue to be fully liable for all of their actions. The only thing it changes is that parties would no longer be liable for what the court determines is the fault of others.

If the court finds a party's actions causes 10 percent of the harm, that party is liable for 10 percent of the damages awarded. If it causes 100 percent of the harm, it is liable for 100 percent of the damages. It is that simple.

I do not mean to imply that this amendment is inconsequential. I am well aware of the significance and magnitude of the impact this change would have on present case law. Indeed, I would be disappointed if it did not have a major impact on the mess created under the present system.

As currently drafted, the amendment applies to title III only. We are still studying the advisability of extending it to title II, and a number of other issues, but I wanted to get the draft language distributed as quickly as possible in order to receive comments and suggestions.

Let me emphasize that we are very open to suggestions on this amendment, but the language of my amendment mirrors that of a statute recently passed by the Kansas legislature and enacted into law there. It has been upheld and indeed almost praised by the Kansas Supreme Court. In the 1978 case of *Brown* v. *Keill* the Supreme Court of Kansas said, "There is nothing inherently fair about a defendant who is 10 percent at fault paying 100 percent of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss."

There remains one very important question which needs to be addressed. What happens to the plaintiff when the party who is largely at fault has no means to pay and does not carry adequate insurance coverage? It is very true that under my amendment not all plaintiffs would be compensated to the extent they are today in some cases.

The answer, to be very blunt about it, is that they will not always be fully compensated when the party at fault cannot pay. The sad fact of life is that there will always be those kinds of cases, but to use the present joint and several liability doctrine in an attempt to compensate the plaintiff makes no more sense than it does to send the witness of a robbery to jail because we cannot find the robber!

I realize there are those who would say that there should be a social policy that allows the injured party to be compensated to the full extent of his or her injury. I am not here to argue that today, and I do not think that the Kansas Supreme Court was arguing that point either. But what I would argue is that if we do make such a policy decision, we should also accept the responsibility to compensate the injured party rather than to artificially pass it along to a substantially innocent third party.

To say that because someone was 1 percent responsible for the harm justifies holding that party liable for 100 percent of the damages ducks the issue, particularly in the context of civil cases.

In conclusion, we have got to return some sense and responsibility to the system. I think we all realize our tort system has gotten out of hand. We need to address it in a thorough manner. The concept of S. 1999 is a good start, but unless this issue is adequately addressed, I am not convinced that the bill before us provides adequate relief.

As much as I have pushed for product liability reform over the past years, I am not at all certain that I am prepared to support a measure that does not provide meaningful relief. I believe that if this amendment is added S. 1999 will do so.

[The amendment referred to follows:]

On page 60, insert the following immediately after line 3:

LIABILITY OF PARTIES

SEC. 308. In any action brought under this title in which the trier of fact is able to allocate liability among the parties, the liability of all parties shall be several, except that in any case where the parties are found to have engaged in concerted action, the liability of all parties shall be joint and several. Where the comparative negligence or responsibility of the parties in any such action is at issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's negligence or responsibility bears to the amount of the negligence or responsibility attributed to all parties against whom such recovery is allowed.

Senator KASTEN: I would like to thank the members of our previous panel, and ask now that our second panel come forward, including Professor Weill, Dr. Karrah, Mr. Nute, and Dr. Lamm.

Our first witness on this panel is Prof. Hans Weill, Tulane Medical Center, New Orleans, LA. Professor Weill.

STATEMENTS OF HANS WEILL, PROFESSOR, TULANE MEDICAL CENTER; DR. BRUCE KARRAH, VICE PRESIDENT, SAFETY, HEALTH AND ENVIRONMENT, E.I. DU PONT, REPRESENTING THE CHEMICAL MANUFACTURERS' ASSOCIATION; LESLIE F. NUTE, DIRECTOR OF LEGISLATIVE AFFAIRS, DOW CHEMICAL USA; AND D. STEVEN LAMM, CONSULTANTS IN EPIDEMIOLOGY AND OCCUPATIONAL HEALTH, INC.

Mr. Weill. Thank you, Mr. Chairman, members of the subcommittee. My name is Hans Weill. I am professor of medicine at Tulane University and also the chief of the Pulmonary Disease Division. I direct a large multidisciplinary resesarch group in occupational and environmental lung diseases funded primarily by the National Institutes of Health.

A brief resume is attached which indicates my substantial interest in the use of science and public policy decisionmaking.

I am pleased to indicate my strong support for the approach taken by the drafters of this proposed legislation to the resolution of the burdensome inequity and inefficiency which exists in our current methods of compensating individuals injured by exposure to harmful substances.

The short time available to me for review of this bill and the press of other commitments makes it necessary to provide only an outline of my remarks to the subcommittee today.

Mr. Chairman, I would like to just very briefly highlight the issues that I think are relevant to my testimony. Clearly, they deal only with the scientific basis for the process which is envisioned. The determination of causation by epidemiological studies is a sound approach. To be workable, however, it will depend upon the recognition of both the strengths and the weaknesses of these data.

First of all, there is a need to recognize that multiple risk factors frequently interact rather than exert their effects indepedently. This point is made because in fact the language of the bill does not deal with interaction, and as I will mention in a moment, that is going to be a very substantial portion of what is going to be faced.

Second, defining the increase in risk by legislatively mandating a prescribed percentage excess, I believe, should be reconsidered as other witnesses have suggested as well. One very important reason is that, for instance, a 30 percent or greater excess has been shown to be associated with all sorts of compounding not related to the exposure of interest, and I have related a few things here, such as socioeconomic factors, cultural differences, geographical variation, and health experience and smoking habits.

The excess will always be defined in relation to a comparison population. A point that has not been made yet and I think is of some importance is, what do we compare the experience to? National rates are used very frequently. It is the largest data base, but very often least appropriate because of regional differences in a particular health experience. Lung cancer is a good example. State rates are better, and often used. Local rates might be best, but because the data base is small, are relatively unstable.

Causation in a study is most convincingly demonstrated if you can show some relationship between the outcome of concern and dose, and dose would be both intensity of exposure, which we usually do not have available, and duration of exposure, which we very often do have and is an important component of dose.

Now, the concept of exposure to an individual has little meaning without some estimate of dose. There is a need to distinguish between trivial and meaningful exposures in regard to potential causation. I did see an earlier draft of the bill, and I recall that the concept of dose was included in the language. It seems now to be gone.

I would suggest that there be reconsideration of that deletion. Now, chance may explain elevated risk, but that is unlikely if in fact there is a relationship shown to dose or time since first exposure, and if the effect is repeatedly demonstrated, a single study showing an excess may or may not turn out to be correct in relating that excess to an exposure.

Repeated showing of that or replication is, of course, extremely important from a scientific standpoint. Another point is that the relative risk concept which is, of course, focused on in this bill is not really suited very well to the contribution of that risk to nonmalignant diseases. This approach is useful primarily when the measure of disease outcome is expressed in terms of the expected general mortality, say from malignant neoplasms, which of course is a substantial concern.

However, nonmalignant health effects that would include asbestosis or, say, loss of lung function related to a massive irritant gas exposure, Bhopal is an example, not easily expressed in terms of relative risk. Another way has to be dealt with to address that. In either situation there are multiple risk factors. Contribution to cause, and apportioning these influences might be considered, and I suggest that be discussed further.

Now, I think a National Toxic Health Effects Panel does deserve further consideration, particularly in regard to desirability of a mix between public and private sector representation. If disciplines are going to be listed as they are, I would strongly suggest that a statistician be among those listed.

I would now like to summarize my recommendations to the subcommittee in its deliberations. First, I strongly suggest the inclusion of academic scientists and others from the private sector on a health effect panel. Second, the level of excess risk determined to be significant should be left to a panel to decide based upon assessment of the totality of the scientific evidence.

Third, the guidance to the panel as expressed in the legislation should include consideration of exposure dose when that information is available. There should be further consideration given to the approach for compensating those who have exposure related nonmalignant effects. A different approach will probably be necessary. Penultimately, there should be a review of the benefits of determining proportional contribution to risk. This has been discussed earlier this morning. I happen to be in favor of some sort of proportional contribution concept, and believe it is workable.

And last, since the scientific data base and the panel evaluating that data base will be depending on results of long, difficult, expensive studies, I think we have to give consideration to increasing that scientific data base, and although it may sound a bit self-serving, that really does mean more research in epidemiologic causal associations.

Thank you, Mr. Chairman.

Senator KASTEN. Professor, thank you very much.

Our next witness on this panel is Dr. Bruce Karrah. He is the vice president, safety, health, and environmental affairs of the E.I. du Pont Co. representing the Chemical Manufacturers Association. Dr. Karrah.

Dr. KARRAH. Thank you, Senator Kasten.

With your permission, I would like to ask Mr. Nute to go first, and then me follow him.

Senator KASTEN. Sure.

Mr. NUTE. Good morning, Senators.

My name is Leslie F. Nute, and I am director of legislative affairs in the legal department of the Dow Chemical Co. Thank you for the opportunity to testify on S. 1999 on behalf of the Chemical Manufacturers Association.

The chemical industry always has believed that a company which is at fault for harm caused by its product should compensate the person harmed. The proper function of the product liability litigation sytsem is to identify the proximate cause of the injury and who, if anyone, is at fault.

The witnesses at the recent Feburary 27 hearing made clear that the need for product liability reform is widely recognized. My comments today will be limited to the so-called toxic tort provisions of title 2.

During the February 27 hearing, Senator Danforth said more than once, "a simple claim system is the goal." Senators, title 2 has a radical new causation test for toxic torts. It also has a provision that makes a manufacturer fully responsible without any proof of who made the product.

Senators, title 2 is anything but simple. CMA strongly objects to the tendency exemplified by section 205(d) of title 2 to single out the chemical industry for exceptionally harsh liability without cause.

Section 205(d) would impose a separate causation test on manufacturers of hazardous substances. It would ignore sound scientific reasoning and allow causation to be found on the basis of an invalid statistical presumption. Thus it would impose liability even though there is only a small likelihood of actual causation.

In addition, due process would be denied in proceedings before the National Toxic Health Effects Panel which could make final decisions that could not be appealed. Singling out the chemical industry and other manufacturers of hazardous substances has been the subject of extremely heated controversy in recent years.

It has been proposed repeatedly in Federal environmental legislation and has been defeated every time in both the House and the Senate. Any attempt to advance such a proposal as part of the needed tort law reform bill would only delay and complicate the process. Most product liability litigation against manufacturers of hazardous substances arises out of injuries in the workplace.

In these cases, the chemical manufacturer supplies the substance to the employer together with an appropriate warning. The chemical manufacturer does not have control over any use of the substance in its customer's workplace. Here, the employee and his employer are in the best position to avoid the harm. It makes no sense to single out the chemical manufacturer for liability without fault or causation. In many cases the tort law system works the same way for a toxic tort as it does in other cases. Causation when it exists may be proved with the assistance of properly qualified scientific evidence. Plaintiffs are able to recover for toxic harm when there is actual causation and fault. Toxic torts are processed and settled by major manufacturers right along with other cases.

Litigation involving claims for toxic torts are a routine fact of life for all chemical companies. For example, in 1985, my own company, Dow, had 423 product liability claims made against it by 522 claimants. That is roughly eight product liability suits per week. Three hundred and forty-five of these claimants alleged a toxic tort. Claims of 142 of the 1985 toxic tort claimants have already been resolved. Under title 2 the number of claims against Dow probably would escalate dramatically. A claimant could file against Dow on the basis of any exposure to a product of the type which Dow makes. The claimant would not have to show scientific causation or even that Dow made the product that allegedly injured him.

No reform of product liability tort law should involve an artifical increase in the number of claimants, or any changed or reduced proof. A new law of causation for toxic torts is the wrong approach. The boundaries of the present product liability litigation system should be carefully delineated by redirecting it to a fault-based system as contemplated in title III.

CMA believes that the problems of excessive delay and transaction costs should be addressed by consideration of alternative dispute resolution procedures or appropriate settlement incentives.

Now, I would like to introduce Dr. Bruce Karrh, who, Mr. Chairman, you have already mentioned, is vice president of health, safety, and environmental affairs for the DuPont Company.

Dr. KARRH. Thank you, Mr. Chairman. I am a physician. I would like to address the issues particularly from the scientific standpoint. First of all, I would like to thank you for the opportunity to testify for the Chemical Manufacturers Association before your subcommittee today on S. 1999, and I will try to briefly summarize my remarks. CMA's approach to product liability starts with safety. Throughout the years the chemical industry and CMA have worked diligently to achieve product safety, the safe transportation, handling, and use of chemicals. The chemical industry recognizes corporate responsibility as a part of its commitment to product safety.

Nevertheless, the industry has strongly resisted the recent trend in product liability law, torts liability without fault or causation, but this resistance is not a rejection of a fairly adjudiated fault based liability for harm that is actually caused. Efforts to loosen common law causation requirements combined with strict liability present a very substantial problem for manufacturers of hazardous products which may present a risk of long latency toxic harm.

Such loosening would improperly permit recovery by plaintiffs who cannot prove causation but can show some minimal exposure to a hazardous product and would subject manufacturers of hazardous substances to massive numbers of claims without fault. Where causation actually exists, plaintiffs have generally been able to establish causation and to recover. Both traditional medical expert testimony and properly qualified statistical evidence have been admitted for this purpose.

Title 2 of S. 1999 would impose liability without any scientifically valid causal link between the manufacturer's product and the harm. Section 205(d)(1) provides an underlying test for toxic harm causation which relaxes common law causation requirements. Section 205(d)(2) imposes a conclusive presumption of causation whenever the "statistical incidence of such harm in exposed population exceeds the incidence of nonexposed populations by 30 percent or more."

In essence, section 205(d)(1) would permit a finding that exposure to a toxic agent caused claimants toxic harm. This would be permitted even in the absence of the scientifically required determinants of causation. Sound science requires the consideration and exclusion of other possible causes and confounding factors.

In addition to reliance on inferences from statistical association, the most troublesome provision in section 205 is the 30-percent incident standard in section 205(d)(2), which is distressing from a scientific point of view. It provides a purely statistical criterion which may or may not have biological significance for establishing conclusions of causation.

Multiple tests of statistical significance on the same body of data are likely to produce some positive results by chance alone. Section 205(d)(2) contemplates that the 30-percent trigger point could reliably identify cause and effect relationships between the incidence of disease and hazards in the workplace, yet we are aware of no scientifically acceptable rationale for the selection of 30-percent or of any other arbitrary statistical trigger point that can be generally depended upon to link a disease to its causes.

Inherent limitations of present day epidemiological inquiry can only lead to the conclusion that any arbitrary and inflexible incident standard is likely to be a poor criterion for determining causation. Hence it would be unreliable for decisionmaking, often requiring invalid conclusions based upon unreliable data.

Furthermore, a 30-percent incidence of disease over some comparison of background data does not mean there is a 30 percent likelihood of getting the disease that is in question. Section 213 provides for the establishment of a National Toxic Health Effects Panel which would be empowered by section 205(c) to make inclusive generic determinations regarding the increased incidence of harm which would be caused by certain exposures to certain toxic agents.

For reasons stated in my written testimony, this panel cannot be counted on to ensure scientifically sound decisions or to cure the fundamental flaws in these provisions which have been idetified above. There is a substantial likelihood that the panel will far far short of the ideal of a wise science court. Much worse than a lack of substantive standards and institutional structure, however, is the absence of adequate procedures for adjudication before the panel or the right to obtain review of the panel's decision.

Any institutional framework designed to bring good science into a legal adjudication process must provide for a sound finite decision in each individual case while protecting the decisionmakers from any rigidity inherent in the legal system. Case-by-case decisionmaking is the first principle necessary to bring good science into adjudication.

The second principle necessary to bring good science is that case-by-case decisions should reflect the best judgment of the highest quality scientific minds based on the latest scientific theories and information available at the time of the decision. These suggestions regarding a scientific adjudication would obviously have to be tailored to the specific context in which the panel was used.

Nevertheless, they suggest an appropriate approach to the problem of bringing good science in for decisionmaking to chronic toxic causation issues.

Thank you very much, Senator. I look forward to further discussion of this issue with you.

[The statement follows:]

STATEMENT OF THE CHEMICAL MANUFACTURERS ASSOCIATION

I. INTRODUCTION

The Chemical Manufacturers Association (CMA) is a non-profit trade association whose members represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States. Chemical industry products are shipped and used throughout the United States. Many of the chemicals manufactured by industry members are used in the work places of other manufacturers where they are used as ingredients of downstream products.

Like many other products such as power tools, lawn mowers, and motor vehicles, chemicals can be hazardous. The transportation, handling, and use of chemicals require special precautions. For this reason CMA and the chemical industry have been pioneers in the safe transportation, handling, use, and labeling of hazardous substances. CMA and the industry have also been pioneers in scientific studies designed to explore both the short-term and the long-term health effects of hazardous substances.

In addition, CMA has been an active participant in recent product liability reform efforts. These reform efforts are industry's response to a continuing expansion of product liability. The expansion has gone so far that the courts are clogged and reasonable casualty insurance is unavailable.

Expansion of product liability is unwarranted from a public policy point of view. The excessive transaction costs of the tort law system make it far too expensive to be a welfare compensation system, and it cannot be justified as a rational deterrent to the unsafe manufacture and distribution of hazardous substances.

Title III of S. 1999 represents a constructive effort to deal with flaws in the tort law product liability system. Although further work is still needed, the uniform product liability standards set out in Title III of S. 1999 are an improvement over current tort law. The alternative claims system in Title II, however, presents serious difficulties as presently framed and cannot be supported.

From a chemical industry perspective, the most serious problems with the Title II claims system involve determinations of causation for toxic harm. As proposed, these determinations need not be based on valid science, and an inappropriate statistical presumption has been added. As a result, liability would be imposed on a manufacturer despite the likelihood that he did not cause the harm. Also distressing is the fact that liability can be imposed on the basis of a causation determination by a National Toxic Health Effects Panel without due process or opportunity for appeal.

In addition, Title II permits liability to be imposed upon only one of many possible manufacturers when there is no proof that the manufacturer actually made the product that caused the harm. Moreover, fault has been essentially eliminated as a standard for liability in Title II. We particularly object to section 205(b) which imposes an unacceptable and likely impossible burden on the manufacturer to prove that his product's utility outweighs the risks. This will be particularly difficult for manufacturers of leisure, recreational, beauty and fashion products, and also for manufacturers of components and ingredients of final products.

As framed, Title II will lead to yet more litigation, rather than fostering dispute resolution. Instead, there must be incentives for settlement; and these can only rest on a doctrine of fairness for all parties. Thus, we believe that other alternatives to the tort law product liability system should be considered. Alternatives which do not require adjudication of a separate liability trigger, such as alternative dispute resolution or a settlement facilitation procedure, should be considered instead of the Title II voluntary claims system.

II. CMA AND ITS MEMBERS EMPHASIZE PRODUCT SAFETY AND SUPPORT EFFORTS TO ENACT SOUND PRODUCT LIABILITY REFORM.

The chemical industry's approach to product liability starts with safety. The industry and CMA have worked to achieve a high and enviable level of product safety. Indeed, since many industrial chemicals are potentially hazardous, this traditional and continuing emphasis on safety has allowed our society to enjoy the benefits of industrial chemicals which are essential to our modern technology and standard of living.[1]

There is also a long-standing chemical industry commitment to the development of scientific information about the potential of chemicals to cause acute and chronic harm.[2]

The chemical industry also recognizes corporate responsibility as a part of its commitment to product safety. The industry has always acknowledged that a company which is at fault for harm caused by its product should be required to compensate the person harmed. Nevertheless, the industry has strongly resisted the recent trend in product liability law towards liability without fault or causation.

Given industry concerns regarding product liability, CMA has been an active participant in product liability reform efforts. CMA participated in the development by the Department of Commerce of a Model State Product Liability Reform Act.[3] When this Carter Administration initiative did not prosper, CMA joined with other manufacturers and sellers in The Product Liability Alliance which has supported S. 100, Senator Kasten's earlier Bill, and worked with the Commerce Committee Staff on Staff Draft #1 and S. 1999.

Throughout CMA's participation in these reform efforts CMA's approach has been to preserve and perfect the traditional fault-based product liability tort law system as a fair means of requiring those at fault for causing injury to provide compensation. At the same time, CMA has resisted liability without fault, and particularly liability without causation, whether in the tort law system or some other alternative liability scheme.

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[1] One example of this commitment to safety has been the development and publication of an industry consensus standard on warning labels for hazardous substances. Starting in 1946, CMA began publication of its Labeling and Protective Information Manual. In 1976, publication of the Manual was taken over by the American National Standards Institute. CMA is now the ANSI Secretary responsible for development of ANSI Z 129.1, the present industry consensus labeling guideline.

Another example is the 1970 formation within CMA of CHEMTREC, the Chemical Transportation Emergency Center. CHEMTREC maintains a round-the-clock information hot-line for emergencies involving hazardous substances. CHEMTREC is relied upon by transporters and shippers, and local, state, and federal governments for emergency response information and a communications link-up with safety experts who are made available by chemical industry companies. More recently, in 1985, CHEMTREC was expanded into the National Chemical Response and Information Center which also includes CHEMNET, a mutual aid network. This network provides at-the-scene assistance, and emergency response training.

[2] An example of this commitment is the creation in 1976 of the Chemical Industry Institute of Toxicology, which has been a world leader in the scientific investigation of the toxicological effects of exposure to hazardous substances. In addition, since 1969, CMA has directly supported toxicological research for its member companies on many widely used industrial chemicals.

In recent years CMA provided financial support for an independent study of health effects caused by exposure to substances from old hazardous waste disposal facilities. This study was conducted by a blue ribbon panel of independent academic scientists convened by Universities Associated for Research and Education in Pathology, a consortium of major universities and medical schools.

[3] Model State Product Liability Reform Act, United States Department of Commerce, 1979.

III. THE IMPOSITION OF PRODUCT LIABILITY WITHOUT FAULT AND CAUSATION MUST BE REJECTED.

Product liability law has been expanding and increasing the liability costs of product manufacturers and sellers. This expansion has lead to substantial dilution of the traditional requirement that the defendant be negligent or at fault in order for the plaintiff to recover.[4] Traditional defenses such as assumption of the risk and contributory negligence, have been eroded.[5] There also have been persistent efforts to weaken common law causation requirements, particularly with regard to claims of injury from hazardous substances.[6]

Expansion of product liability, however, has gone too far. The courts are clogged with product liability and other personal injury cases.[7] Compensation for people who should be compensated is often too long delayed and legal fees and other transaction costs eat up a major portion of awards.[8] Manufacturers and sellers are pressed by huge liabilities based on strict liability, punitive damages and class actions. The risk of liability has become so great that insurance is rapidly becoming unavailable.[9]

Manufacturers of products which could present a risk of long-latency toxic harm have a special concern regarding any effort that would loosen common law causation requirements and permit recovery by plaintiffs who cannot prove causation, but who can show some minimal exposure to the product.[10] It is common now for a plaintiff to seek recovery for fear of harm, even though there is no evidence of physical harm.[11]

Relaxation of common law causation requirements, combined with the imposition of strict liability, would subject manufacturers of hazardous substances to massive numbers of claims. Countless people have been exposed in workplaces and the general environment. Such claims could be made even though exposure was at low levels and in insignificant amounts. The chronic injury from such exposure is very unlikely. Nonetheless, under causation theories advanced by the plaintiff's bar, full recovery would take place.[12]

There is no sound reason to provide different treatment for toxic injury cases by relaxing common law causation requirements in the case of chronic toxic harm. Plaintiffs have a mechanism to establish causation and generally recover where causation actually exists. Both traditional medical expert testimony, and properly qualified statistical evidence have been admitted for this purpose.[13] Nevertheless, pressure for further relaxation of causation requirements for alleged toxic substances injury persist.

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[4] See The Restatement (Second) Torts, § 402(a) (1965). The publication of section 402(a) in 1965 was the high point in the common law development of strict liability for unreasonably dangerous products.

[5] Prosser & Keeton, "The Law of Torts," 451, 469–70, 480 (1984).

[6] *See* S. 1480, 96th Cong., 2d Sess. § 4(c)(3), (1980); Senate Comm. on Environ. And Public Works, 97th Cong., 2d Sess., "*Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies*" A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96–510, December 11, 1980) by the "Superfund Section 301(e) Study Group," Part 1, The Report and Comments, 196 (Comm. Print Sept. 1982) [hereinafter Section 301(e) Report]; and Trauberman, J., "Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim" 7 (Environmental Law Institute 1982) [hereinafter ELI Toxic Torts Study].

[7] Chief Justice Burger has eloquently stated the problem: "It is becoming trite to say Americans tend to be the most litigious people on the globe, using the courts for airing all manner of grievances, disputes and perceived "entitlements." The escalating demands imposed on the courts have led to their becoming congested, slow, and costly." Burger, Warren E., "1982 Year-end Report on the Judiciary," 8–9 (1982) (footnote omitted).

[8] In a comprehensive assessment of the transaction costs of asbestos litigation, The Rand Institute of Civil Justice found that 63 percent of the funds expended went for transaction costs (37 percent for defendants' expenses and 27 percent for plaintiffs' expenses) with only 37 percent left over for plaintiffs' compensation. These percentages do not include the costs of judicial administration. Kakalik, J.S., et al., "Costs of Asbestos Litigation," (Rand Institute for Civil Justice 1983).

[9] See Gettinger, "Liability Insurance Squeeze Spurs Pleas to Hill for Relief," January 25, 1986 Congressional Quarterly 148.

[10] See the Section 301(e) Study and the ELI Toxic Torts Study.

[11] See, e.g., *The Complaint in Anderson* v. *Cryovac,* et al., Civ. No. 82-1672-S, (Middlesex County, Mass. 1982); *Adams* v. *Johns-Manville Sales Corp.*, 756 F. 2d 1068 (5th Cir. 1985); and *Plummer* v. *Abbott Laboratories,* 568 F. Supp. 920 (D.R.I. 1983).

[12] See Black & Lilienfeld, "Epidemiologic Proof in Toxic Tort Litigation, "52 Fordham L. Rev. 732 (1984).

[13] Id., at 746, 769–75. Hall & Silbergeld, "Reappraising Epidemiology: A Response to Mr. Dore," 7 Harv. Env. L. Rev. 441 (1983).

The tort law product liability system has two basic purposes. The first purpose is to compensate an injured person who can prove that another person is at fault for causing his injury. The second purpose is to punish and deter the careless manufacture and design of products, thus avoiding future injury. Neither of these purposes, however, can be effectively advanced by assigning liability without causation.

In recent years, the compensation function of the tort law has been stretched to include a more general charitable function. This broader function cannot be achieved in any practical manner by loosening causation requirements. The tort law system is simply too expensive in terms of transaction costs to permit any rational consideration of expanding it to perform a broad welfare function.

The second goal, to deter conduct that results in accidents and injury, has been articulated by Guido Calabresi, now Dean of the Yale Law School.[14] In theory, deterrence is accomplished by placing the costs of an accident or injury on those parties who caused it and can also be motivated by the cost of liability to avoid it. Thus, in Calabresi's view, the liability deterrent should be placed on the person who can avoid the accident or injury at the least cost: "The question for a pure market approach is, then, how we should determine who, in practice, is the cheapest cost avoider." . . .[15]

Elimination or dilution of common law causation requirements for hazardous substances runs directly counter to the least-cost-avoider principle. A manufacturer of a hazardous substance cannot be the least-cost-avoider or even an avoider at all unless the hazardous substance actually caused the injury.

The relaxation of causation requirements would also be a radical departure from basic common law concepts of justice. Ever since our legal system passed beyong its primitive superstitious stage, actual, empirical causation has been a fundamental determinant of liability. Dean Prosser has said that "[a]n essential element . . . for any . . . tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." [16] Professor Leon Green has said that "causal relation is the universal factor common to all liability." [17] Sir Frederick Pollock has said that "[w]hen complaint is made that one person has caused harm to another, the first question is whether his act was really the cause of that harm. . . ." [18] Indeed, imposition of individual liability without causation runs counter to all our basic concepts of legal and moral responsibility and must be rejected as unjust.

Thus, defendants have properly resisted erosion of common law causation requirements. This resistance is not limited to civil litigation under the tort law. To the extent plaintiffs find it difficult to prevail without sound evidence of causation, there are continuing proposals for alternative systems which offer causation presumptions and reduced burdens of proof. Such an alternative is found in Title II of S. 1999. It cannot be supported by the chemical industry for reasons of sound jurisprudence already cited, as well as scientific and procedural flaws which we present below.

IV. TITLE II OF S. 1999 WOULD IMPOSE LIABILITY WITHOUT ANY SCIENTIFICALLY VALID CAUSAL LINK BETWEEN THE MANUFACTURER'S PRODUCT AND THE HARM.

Section 205(d) of the Title II alternative claims provision sets out separate procedures and tests for determining causation in instances of long latency toxic harm. Section 205(d) of the Title II alternative claims provision sets out separate procedures and tests for determining causation in instances of long latency toxic harm. Section 205(d)(1) provides an underlying substantive test for toxic harm causation which relaxes common law causation requirements, and section 205(d)(2) imposes a conclusive presumption of causation whenever the "statistical incidence of such harm in an exposed population . . . [exceeds] the incidence in non-exposed populations by 30 percent of more."

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[14] See G. Calabresi, "The Costs of Accidents", 26, 68–94 [1970] and The ELI Toxic Torts Study at 3–7. See also, the seminal article of Coase, R.H., "The Problem of Social Cost," 3 J. Law & Econ. 1 (1960).

[15] Calabresi, at 139. The ELI Toxic Tort Study relies directly on Calabresi. ELI Toxic Tort Study at 26. It should be noted that this doctrine is much like the doctrine of proximate cause because it is likely to select as the least-cost-avoider a party who is not remote or disconnected from the injury. Workplace injury involving an outside supplier's product is an excellent example. So long as adequate warnings are provided with the product, the employer and the worker are in the best position (are the least-cost-avoiders) to avoid the injury. Thus, the attempt of Title II to run liability back up the commercial chain on a no fault/no cause basis is contrary to Calabresi's principle.

[16] W.L. Prosser, "The Law of Torts" 236 (4th ed., 1971).

[17] L. Green, "Rationale of Proximate Cause" 132 (1927).

[18] F. Pollock, "The Law Of Torts", Vol. I, 30 (1889).

A. Section 205(d)(1) Fails to Require a Valid Scientific Determination

Section 205(d)(1) fails to require the elements of a valid scientific finding of causation and fails to provide an adequate basis for causation determinations.

First, there is no requirement in section 205(d)(1) (or in the definition of exposure) for any significant exposure to the toxic agent. In addition section 205(d)(1) fails to require that the harm or disease be defined in terms of the specific elements of diagnosis, so that misdiagnosis and compensation of unrelated disease or harm can be avoided.

Another flaw in section 205(d)(1) is that the risk attributable to a different toxic agent could not be shown by a defendant as a likely cause of claimant's harm "unless another toxic agent is more likely than the product at issue to have independently produced claimant's toxic harm." This limitation would preclude a defendant's showing that the aggregate of a number of other attributable risks far outweighs the risk from his product. Moreover, the word "independently" seems to imply that attributable risks from other toxic agents cannot be considered if they have any possible synergistic effects with the product at issue. This provision would so circumscribe the opportunity to show attributable risks from other agents that the only actual means of defense would be to prove the negative, that the product at issue could not have been the cause. These provisions, therefore, will lead to many cases where causation by a product is wrongly determined even though other toxic agents are far more likely to be the cause.

In essence, section 205(d)(1) would permit a finding that exposure to a toxic agent caused a claimant's harm even in the absence of the scientifically required determinants of causation. These require the consideration and exclusion of other possible causes and confounding factors in addition to reliance on inferences from mere statistical associations. Satisfaction of these requirements, most often referred to as the Henle-Koch-Evans postulates,[19] is generally accepted by biologists as a necessary minimum to move beyond a statistical correlation to a valid biological inference of causation.[20]

B. The 30 Percent Increased Incidence Standard is Scientifically Invalid

The 30 percent increased incidence trigger is particulary distressing from a scientific point of view. It provides a purely statistical criterion for establishing a conclusion of causation. The Henle-Koch-Evans postulates are disregarded.[21] This statistical criterion may or may not have biological significance. Multiple tests of statistical significance on the same body of data are likely to produce some positive (statistically significant) results by chance alone.[22]

Raw epidemiological statistics often are not a proper basis for specific causation determinations. Epidemiological inquiry begins in an effort to generate hypotheses for further investigation and more refined study. While hypothesis-generating studies may produce reliable conclusions concerning true risk, there is a much greater likelihood that this will not be the case. S. 1999 would, therefore, often elicit an invalid and therefore improper conclusion of causation.

Even where it is possible by means of a series of thorough and well-designed studies to conclude that an excess incidence of disease exists, and that the excess incidence may be associated with an exposure, it still remains inadvisable to extrapolate findings deemed valid for one population to any other population unless the other population is also controlled for the same variable factors. If confounding factors such as age, smoking, diet and alcohol consumption differ, an apparently-similar exposure experienced by two populations may have little significance. Variations in the level or intensity of the exposure may also make it inappropriate to extrapolate study results from one population to another.

Moreover, section 205(d)(2) says nothing about the size of the sample which is required to establish a 30 percent statistical increase in incidence to trigger a conclusion of causation. It is a basic characteristic of statistics that relatively certainty is directly related to sample size. Stated another way a small population sample is more likely than a larger sample to show, purely by chance, an unexpected high percentage of any measurable event—including the incidence of disease. In a properly-designed study, this chance factor can be quantified through the calculation of levels of significance. Section 205(d), however, neither calls for the gathering of data in a scientifically responsible way nor specifies any appropriate level of significance.

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[19] Evans, "Causation and Disease: The Henle-Koch Postulates Revisted," 49 Yale J. Biology & Med. 175 (1976).

[20] Black & Lilienfeld, "Epidemiologic Proof in Toxic Tort Litigation," 52 Fordham L. Rev. 732, 763-64 (1984).

[21] See footnotes 20 and 21, supra.

[22] In a group of 1,000 employees, one random occurrence of a rare cancer could easily exceed the 30 percent incidence standard.

Section 205(d)(2) contemplates that the 30 percent trigger point can reliably identify cause-and-effect relationships between the incidence of disease and hazards in the workplace. Yet there is no scientifically acceptable rationable for the selection of 30 percent—or, indeed, of any arbitrary statistical trigger point that can be generally depended upon in all situations to link a disease to its causes. The inherent limitations of statistical analysis of population disease studies can only lead to the conclusion that any arbitrary and inflexible incidence standard is likely to be a poor criterion for determining causation, and hence an undependable mechanism for decision-making.

If a fair determination of responsibility rather than imposition of welfare obligation is the objective, the common law approach is correct. Special attention must be devoted to ensuring that causation decisions are not made on the basis of bare statistics without regard to proper causal inference. They must be made only on the basis of valid diagnosis and application of sound scientific concepts.

C. The 30 Percent Increased Incidence Test is a Radical Departure from the Common Law

The 30 percent incidence standard in section 205(d)(2) provides that a risk is significant and conclusive evidence of causation "if the incidence of such harm in an exposed population were to exceed the incidence in non-exposed populations by 30 percent or more." [23] Under such a provision, liability would often be imposed where there actually would be no causation. Moreover, an unknown but extremely large class of persons would be added without justification.

Under the 30 percent provision, if an incidence of a disease 30 percent greater than background occurs in coincidence with an exposure which could have caused the harm, then every case of the disease, whether caused by the exposure or not, would be determined to have been caused by the exposure and compensated. For instance, if background incidence in a group was 100, and the incidence in the exposed group was 130 (a 30 percent increase), then causation from the exposure would be found for all 130 cases—even though as a statistical matter only 30 incidents of the disease would have been caused by the exposure. Accordingly, even accepting 30 percent as a valid scientific basis for inferring causation, which we cannot, out of a average 130 claimants who recover, only 23 percent (30/130) would have a causal relationship and 77 percent (100/130) would recover without causation.

The above percentages must be contrasted with the statistical equivalent of the common law causation requirement. The common law rule rewards claimants only when it is "more likely than not" that the exposure caused the claimant's disease. Translated into the statistical terms of section 205(d)(2), the common law rule would require, in addition to satisfaction of the Henle-Koch-Evans postulates, an increase in incidence over background of 100 percent.[24] By contrast, the 30 percent incrase specified in section 205(d)(2) is less than one-third of the increase which would be required under the common law. This is not a modest relaxation of the common law rule; it is clarly an excessive departure which abandons tort law concepts of responsiblility by imposing an unjustified welfare payment burden on individual manufacturers despite the lack of an actual causal connection.

D. The Proposal for a National Toxic Health Effects Panel Fails to Provide Decisions Based on Sound Science

Section 213 provides for the establishment of a National Toxic Health Effects Panel ("NTHIP") which would be empowered by section 205(c) to make conclusive generic determinations regarding the increased incidence of harm caused by exposures to hazardous substances. In addition, the NTHEP is given jurisdiction under section 213(d) to adjudicate causation issues in individual cases.

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[23] This provision is almost identical to provisions sponsored by organized labor in workers compensation reform proposals in the Williams Bill, S. 3090, and in section 10(7) of H.R. 1309. Surprisingly, the presumption is only one-way. Even if a claimant cannot show a 30% increased incidence, he can still file a claim and go to court for a ruling in his favor.

[24] See Black & Lilienfeld, "Epidemiologic Proof in Toxic Tort Litigation," 52 Fordham L. Rev. 732, 767, 773-75 (1984).

Section 213 provides for the establishment of a National Toxic Health Effects Panel ("NATHEP") which would be empowered by section 205(c) to make conclusive generic determinations regarding the increased incidence of harm caused by exposures to hazardous substances. In addition, the NTHEP is given jurisdiction under section 213(d) to adjudicate causation issues in individual cases.

As discussed above, it is important that any legislative reform of product liability include explicit provisions to ensure that sound science is applied in making causation determinations. The proper place for these provisions is in section 213, which provides for the NTHEP. Unfortunately, section 213 imposes almost no constraints. And, except for the inappropriate 30 percent increased incidence standard, it does not give any guidance to the NTHEP. Thus, the NTHEP cannot be counted on to ensure scientifically sound decisions or to cure the fundamental flaws in the causation provisions identified above.[25]

The basic approach taken in section 213 is to provide for the selection of nine scientically-qualified NTHEP members and then to insulate them from normal and scientifically required standards of external peer review as well as any due process appeal. This approach is flawed in a number of respects.

The selection criteria for the nine panel members in section 213(a) are intended to provide for an able and impressive panel.[26] What section 213 fails to specify, however, is how such idelaized criteria can be met. Attracting and retaining an adequate number of exceptionally well-qualified scientists from a variety of disciplines to serve in government positions where their scientific careers must be subordinated to onerous ajudication obligations will be extremely difficult if not impossible. Scientific uncertainty about the cause of many diseases requires the latest scientific knowledge which is difficult to maintain unless a person remains active in the field.

As proposed, there is a substantial likelihood that the panel will fall far short of the ideal of a science court. It would be an administrative agency with an excessive workload, underpaid and overworked members, and no executive structure. Such expert administrative agencies or panels have had difficulty functioning fairly and effectively in the past.[27] Well articulated decision-making procedures and criteria and well-designed oversight and review provisions are essential for making NTHEP a workable institution. Unfortunately, S. 1999 contemplates none of these elements.

E. The Proposal For a National Toxic Health Effects Panel Fails to Provide For Due Process

Much worse than the lack of substantive standards and institutional structure, however, is the absence of adequate procedures for adjudication before NTHEP or the right to obtain review of NTHEP decisions.

Despite the likelihood that much of NTHEP's business would be individual adjudications of causation, section 213(c) indicates that only notice and a right to comment (without any hearing or right of confrontation) will be available. Given this lack of due process before the agency, it is extraordinary that S. 1999 denies any appellate review except in the case of "fraud or similar misconduct." (Section 213(d)(3)).

This denial of both a hearing and judicial review is inconsistent with the Constitution and the Administrative Procedure Act. Both afford due process and the opportunity for a meaningful hearing to balance the exercise of executive power. The Fifth Amendment to the Constitution decrees that no person shall "be deprived of life, liberty or property, without due process of law." As one commentator has noted, "[a]t the core of this procedural due process right is the guarantee of an opportunity to be heard. . . ."[28] The opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[29]

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[25] The 30-percent statistical standard is the only concrete standard. Others are as general as "the best available scientific opinion." As discussed above, however, the 30-percent standard provides an altogether inappropriate basis for making causation determinations.

[26] They are to be "exceptionally well qualified to analyze and assess the risks to human health associated with exposure to toxic substances." (Section 213(a)). The members are also required to be career employees of the Public Health Service.

[27] The Interstate Commerce Commission, which had been the subject of great criticism prior to its substantial demise with transportation deregulation, is structured very similarly to the proposed NTHEP. The Civil Aeronautics Board, which was a similar expert regulatory body for commercial aviation, was abolished; and regulatory bureaucracies have generally been in disfavor in recent years because of the difficulties they have had functioning effectively. The situation could only be worse where cutting edge scientific knowledge is of critical importance.

In addition to these constitutional considerations, the Administrative Procedure Act ("APA") ordinarily provides separate statutory grounds for review of administrative orders.[30] Accordingly, both due process and APA considerations dictate that a meaningful scope of judicial review must be provided in the statute—particularly if expedited administrative procedures which deny a full hearing are used at the agency level.

The NTHEP would be lacking in standards, and there would be no review, oversight, or accountability for the industry resources committed by its causation adjudications. Absent any oversight or restraint, the agency would drift towards performing the welfare function of helping those before it with injuries and in need of relief, rather than maintaining scientific discipline and fostering sound scientific decisions.

It would be intolerable for a manufacturer of hazardous substances to risk indictment of a whole product line by the NTHEP without being afforded a real measure of due process.

Any institution or process which will bring good science into decisions of causation in product liability cases must start with a recognition of the scientific process and how it differs from legal adjudication. Indeed, when causation of chronic toxic harm is the issue, careful consideration of the scientific process is particularly essential because scientific knowledge in this area is developing and expanding rapidly.

Science is an iterative process in which knowledge and understanding of natural phenomena continue to increase as facts are gathered, hypotheses developed and tested, theories are developed, new facts are gathered etc. Scientific knowledge does not come to an end point; new data is always coming in, old theories are challenged, and new hypotheses are developed and tested. To be sure, at any one point in time there are a number of scientifically accepted theories which enable scientists to explain and predict phenomena in a particular area. Science is never static and scientific judgment is always developing and growing.

Law and adjudication on the other hand require a final decision at a point in time, regardless of any uncertainty in scientific knowledge. Moreover, there is a strong tendency to establish rules and follow precedents, in order to facilitate later decision-making. When scientific issues are adjudicated, the law's need to reach a conclusion often conflicts substantively and procedurally with the iterative process of science which is predicated on continuing inquiry and testing of hypotheses.

Any institutional framework designed to bring good science into a legal adjudication process must provide for a sound decision in each individual case while protecting the decision-makers and the institution from any rigidity inherent in the legal system.

Case-by-case decision-making is the first principle necessary to bring good science into adjudication. This is required in order to avoid rigidity and to allow each decision to take into account the latest available scientific knowledge and understanding. Promulgation of substantive rules and reliance on binding precedents should have no part in the adjudication of scientific issues because such a static approach is contrary to the scientific process and prone to extended error which could lead to major injuries.

The second principle necessary to bring good science into adjudication is that case-by-case decisions should reflect the best judgment of the highest qualified scientific minds based on the latest scientific theories and information from all the relevant disciplines at the time of the decision.

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[28] L. Tribe, "American Constitutional Law" § 10–15 at 550 (1978). Accord *Lichter* v. *United States,* 334 U.S. 742, 791 (1948); *Nickey* v. *Mississippi,* 292 U.S. 393, 396 (1934); K. Davis, 2 "Administrative Law Treaties" § 12:13 (1979); see also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50, 70 n.23 (1982) ("when Congress assigns . . . matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review.")

[29] *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). The Supreme Court has adopted a balancing test for determining the nature and timing of the due process hearing. *Ingraham* v. *Wright,* 430 U.S. 651, 680, 682 (1977). In particular, the requirements of due process as to the timing of a hearing depend on three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including . . . administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976).

[30] 5 U.S.C. §§ 702, 704 (1982).

Qualified scientists in any particular discipline may be found in many places including academic, government, business and public interest institutions. The expertise needed in any particular situation will vary and will be highly specialized. For this reason, scientists relied upon should be currently practicing in their field. Outspoken advocates of any point of view should be avoided and selection should be based only on peer recognized scientific education and accomplishment.

These suggestions regarding scientific decision-making would obviously have to be tailored to the specific context in which the panel was used. Nevertheless, they suggest the only appropriate approch for bringing good science and fair decision-making to chronic toxic harm causation issues.

V. TITLE II IMPROPERLY ALLOWS A MANUFACTURER TO BE HELD LIABLE WITHOUT PROOF THAT IT MADE THE PRODUCT AND WITHOUT A SHOWING OF FAULT

A. Claimants Should Not be Allowed to Select One Defendant from Among the Members of an Industry Which Manufactures a "Toxic Agent"

Section 203(d) of S. 1999 is a *Sindell* [31] type of provision which allows a claimant to select a defendant from among the manufacturers of a product when the claimant cannot identify the actual manufacturer of the product which caused his injury.

This provision is still flawed, although more limited and more reasonable than its predecessor in Staff Draft #1.[32] These limitations still allow a claimant to select a defendant on a basis other than causation and responsibility. This will lead to singling out those companies which have been willing or are able to pay and will also produce much litigation over the applicability of the rule.

In common law tort cases the harsh impact of a *Sindell* causation rule is moderated because defendants can join other appropriate defendants in the main action. Such impleader avoids the injustice of forcing one defendant to pay the whole claim and avoids the problems which can arise from singling out one defendant. S. 1999, however, has no provision for joinder of additional defendants in a Title II claim proceeding. Instead a defendant is left only with the burdensome alternative of filing a later contribution suit in court.[33]

The *Sindell* type of liability provision in section 203(d) remins a most unsatisfactory resolution of the manufacturer "identity" problem. It will work injustice on selected claimants, spawn controversy and litigation over the applicability of the rule, and create a new wave of conbribution litigation in the courts. Section 203(d) should be dropped in its entirety; if not, it must be completely reworked to avoid injustice and to provide reasonable procedural mechanisms which will lead to prompt settlements or efficient resolution of disputes.

B. Section 205 Should Not Impose an Excessive Burden On Manufacturers to Show That Their Product is Not Unreasonably Dangerous

Section 205(b) provides the standards for determining that a product is unreasonably dangerous and therefore subject to an expedited claim under section 205(a). Section 205(b), imposes on manufacturers the burden of showing that their product was not unreasonably dangerous. This burden is so onerous that manufacturers will, in effect, be liable without fault, and claimants will be able to succeed even though their injury had nothing to do with defect in the product.

The unreasonably difficult burden involves a utility/risk calculation in which the manufacturer must prove that:

The product's utility so outweights the risk of the harm caused the claimant that a person knowing of such risk would, nonetheless, in the exercise of reasonable care, be justified in placing a product so constituted, designed, or formulated in the stream of commerce." (Section 205(b)(1)).

Most hazardous substances or toxic agents are sold to other manufacturers as ingredients for use in manufacturing other products. Manufacturers of such materials are hardly in a position to make a case as to the value of the final product. Also, the existence of any actual or potential substitute for the product would complicate the proof of "utility." Moreover, the very concept of "utility" is indefinite and subject to varying interpretation—greatly increasing possibilities for cost benefit arguments and the second guessing of business decisions.

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[31] See *Sindell* v. *Abbott Laboratories*, 607 P.2d 924, 163 Cal. Rep. 132, cert denied, *E.R. Squibb & Sons, Inc.* v. *Sindell*, 449 U.S. 912 (1980).

[32] It is limited to latent toxic harm which manifests itself only long after exposure. It is available only where the claimant made every reasonable effort but could not identify the manufacturer of the product and the product of the manufacturer selected is chemically indistinguishable from the product which caused the harm.

[33] Even in this later suit, the contribution right is curiously limited by the provision in section 211(a)(3) which requires a higher standard of proof in the contribution action.

It will usually be difficult under this test to prove a product was not unreasonably dangerous, and the transaction costs for making such a proof will be very high. In addition, manufacturers of hazardous substances will have to prove that their warning labels are fully adequate in terms of present-day knowledge instead of knowledge which was available at the time the product was sold. The new "unreasonably dangerous" provision will, therefore, be as much of a burden as a protection for defendants. It is very likely to create an atmosphere in which most Title II claims are mired in the very type of litigation Title II seeks to avoid.

VI. ANY ALTERNATIVE APPROACH TO TRADITIONAL TORT LAW MUST COMBINE DUE PROCESS WITH SOUND SCIENCE AND REDUCE TRANSACTION COSTS

Any alternative to the tort law product liability system which selects a specific person to bear the liability burden and blame for a specific injury must, at a minimum, make a reasonable determination of causation. Without a finding of causation the system will lack the most fundamental element necessary to afford justice and avoid arbitrary penalties. Under the Fifth Amendment to the Constitution the system also must afford procedural due process—a meaningful hearing at a meaningful time.

The alternative also must be efficient—allowing a substantial reduction in transaction costs. Excessive transaction costs in the present system is one of the major reasons for reform.

The Title II voluntary claims approach presents very serious problems of lack of fairness, due process, and efficiency. Correction of substantive flaws in order to require a scientifically valid determination of causation is possible. Nevertheless, good science will not be easily brought into a legal adjudication system. When improper presumptions are dropped and a meaningful due process hearing is afforded, any alternative liability system will involve substantial transaction costs for both sides, and the value of the alternative system over the tort law will be doubtful.

Alternative liability standards and adjudication systems seem to inevitably involve efforts to expand the class of persons who can recover from a product liability system. Such expansion is an inappropriate way to provide welfare because excessive transaction costs are still involved. Such expansion is inappropriate as a deterrent because such expanded liability contradicts the least-cost-avoider principle. Expansion of product liability, whether in the tort law system or some alternative system, should be revised, not fostered, by Congress.

Accordingly, the Commerce Committee should explore other alternative approaches which do not, like Title II, require the adjudication of a second, separate liability trigger.

Alternative dispute resolution and settlement incentives are possibilities. The essence of these alternatives is that they encourage the parties to substitute a more efficient settlement process for tort law adjudication, without denying either party the right to have a due process hearing.[34]

Incentives to settle must be fair and practical. Settlement incentives also must alleviate rather than compound the problems of excessive judgments and non-insurability presented by the present tort law product liability system.

VII. CONCLUSION

Product liability reform is necessary and long overdue. Although further work is still needed, the uniform product liability standards set out in Title III of S. 1999 are an improvement over current tort law. The alternative claims system in Title II, however, presents serious difficulties and cannot be supported as drafted.

The most serious problems with the Title II claims procedure involve false determinations of causation. Good science is not required in these determinations and an inappropriate statistical presumption has been added. As a result, liability would be imposed on a manufacturer even though there is only a small likelihood of any actual responsibility. Also distressing is that liability can be imposed on the basis of a causation determination by a National Toxic Health Effects Panel with inadequate scientific safeguards which lacks due procees. Finally, Title II permits liability to be imposed upon only one of many possible manufacturers when there is no proof that the manufacturer actually made the product that caused the harm.

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[34] Prof. Jeffrey O'Connell, who has been the most prominent proponent of settlement alternatives, testified before the Senate Commerce Committee on this subject on June 25, 1985.

Senator **Kasten**. Doctor, thank you very much.

Our next member of the panel is Dr. Steven Lamm, Consultants in Epidemiology and Occupational Health, Inc.

Dr. Lamm.

Dr. **Lamm**. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee staff, fellow panel members and attendees, I am here today to discuss with you the criteria for presuming causation with respect to allegations of toxic harm.

Guidelines for the appropriate inference of causation have been of concern to epidemiologists for decades. The most generally accepted ones are those laid out by Sir Austin Bradford Hill 20 years in the Proceedings of the Royal Society of Medicine. These factors include: strength of association; consistency of findings; specificity of findings; temporality; biological gradient; biological plausibility; coherence, and intervention.

Title II of S. 1999 considers only two of these factors: temporality and strength of association. I would suggest that it include more. I agree with its position temporality and I disagree with its position on strength of association. Its position on temporality is clearly stated in the phrase "at a relevant time." Its position on strength of association is that the harm would be considered real and significant "if the incidence of such harm in an exposed population were to exceed the incidence in nonexposed populations by 30 percent or more," that is, the strength of association was 1.3 or greater.

There seems to be some confusion in the meaning of the 30 percent. I take it to be a measure of the magnitude of effect rather than a measure of the probability of causation. This particular formula is incomplete, too simplistic and does not produce results that conform to our experience of what appears to be causally related and what appears to be fortuitously related.

The specific strength of association chosen here is far lower that even the legal standard of "more likely than not," a standard equivalent to a strength of association of greater than 2.0. There is no suggestion that the finding must be consistent across most studies, that the results must be statistically significant, be less than .05 on a two-tailed poison distribution test, or that the condition must be definably different from that of background cases.

The criteria take no account of the uncertainty within the results or the uncertainty of the conclusion. If a single study showed a relative risk of 1.33, in other words, an excess risk of 33 percent, the given criteria could be met whether this represented 400 cases observed when 300 were expected, four cases observed when three were expected, or one case when 0.75 cases were expected. A stronger statement would be that a statistically significant excess of 30 percent must be consistently observed, or that with 95 percent certainty one can assert, after examining all of the data, that the risk ratio is at least 1.30 and that this has been demonstrated in more than one study.

For instance, the recent NCI report of formaldehyde-exposed workers which was just released at the beginning of the week, showed a risk of 1.32 for lung cancer. That was stated to be not statistically significant and was found not to be related to formaldehyde. Yet, this criteria would presume that formaldehyde was the cause.

There are some phrases within this proposal that I would like to bring to your attention for clarification. Neither the term "exposure" nor the term "risk" is defined. The term "circumstances" should have some attention because much of the understanding of the epidemiology lies in this word.

A concept fundamental to the assessment of the epidemiology of the effects of exposure to toxic substances is the demonstration of a "Dose-Effect Relationship." It is crucial that the circumstances include exposures at the same intensity or similar intensity and duration at which such an increased risk had been consistently demonstrated.

The absence of such an inclusion would lead to consequences such as the following: That every case of malignant melanoma would be attributed to fluorescent lights because one study did show an association; that every case of acute myelogenus leukemia would be attributed to benzene exposures from gasoline exposure because the association has been demonstrated consistently at exposure levels which were orders of magnitude greater than current exposures.

I would note that the current proposal does not allow for the recognition that the toxic substance might be radiation or be of a biological nature such as a virus. If we talk about delayed effects, there are numerous delayed effects with respect to viral infections that might be causally related to environmental exposure. AIDS would be one of the considerations.

In epidemiologic studies, a regular question of introspection for various studies is a determination of the appropriate comparison group. Should the appropriate comparison group be similar to that of the exposed group except for the history of exposure?

For example, the various news services are now reporting the trial in Massachusetts where a cluster of leukemia cases in Woburn are allegedly associated with exposure to TCE and PCE-contaminated wells. Should the risk in this group be compared with the average national leukemia rates; or, considering that the Center for Disease Control has reported studying 100 leukemia clusters without TCE or PCE exposure, should the risk in this group be compared with the average risks in the none-TCE/PCE leukemia clusters? The answer is neither clear nor obvious.

The bill proposes a National Toxic Health Effects Panel. This is presumably another version of a "science court." I am not in favor of this. I have been impressed with the amount of research that has flowed from the various public hearings and court proceedings that have flowed. I am concerned with the proposed composition of the panel where all members are employees of the Secretary of Health and Human Services who appoints them, and are directly under the command of the head of the Public Health Service, the Surgeon General and the Assistant Secretary for Health.

Panel membership is not open to governmental scientists who are civilians or military employees, rather than Public Health Service officers, nor to scientists outside of the Government. The current design allows for the appearance of conflicts of interest both in that the panel members are placed in the position to judge the scientific merit and social utility of studies conducted by or financed by their own agencies, and in the appearance of decisions being influenced by the policies and positions of the employers of the panel members.

Further, the decisions that would be made by the panel are too important and have too great consequences to rest upon the judgment of three of nine panel members. Finally, the provision does not appear to be made to allow questions to be re-opened as new information, analyses, or insight is developed. The opportunity to update the assessment either up or down should exist.

There are a couple of areas within this bill where I have no special competence, but which I care to address. First of all, I do not understand why products acquired by an agency of the Federal Government for an aerospace or defense application should be handled any differently than products for any other part of the government or for the private sector. The shuttle disaster should alert us to not having different standards of safety.

Second, the application of punative damages has always struck me as a type of lottery, and various reports of followup on lottery winners have rarely shown them to be significantly better off a few years alter. What bothers me conceptually is that punative damages are generally awarded to a specific plantiff, while the aggregious action has rarely been taken against that specific individual but has been against the class of which that individual is a member. It occurs to me that a judge might separate the decision of finding for punative damages from that of awarding punative damages. If the punative damages is assesed for actions against "those persons who might be harmed by a product" rather than specifically against that plaintiff, then the punative damages might be awarded to a public trust for the class to be used for such purposes as further research, supply of services to the class, surveillance, or public education.

As I have said, these are issues that have struck me in which I have no experience or expertise. I would close with one further observation about which I feel strongly, and that is with respect to sec. 108. Section 108 indicates that expert opinion must be supported by peer—reviewed studies. This should not be limited to studies that have appeared in the peer—reviewed literature, but should be extended to all studies that are available for peer review. In particular, the underlying data in any study being relied upon should be made available to all parties, with appropriate protective orders concerning misuse, privacy, and publication or commercial rights. Such availability should be enforcible by subpoena on both public and private groups. Too often judgments on causality are being made on the basis of studies whose underlying data is not available. Scientific studies will improve in quality if the authors know that their work may have to withstand scrutiny by peers in the public sunlight. This is not trial by newspaper, but open scientific assessment.

I thank you for the opportunity to share some of my thoughts in this area with you, and I look forward to assisting you both here and in subsequent staff discussions.

Senator **Kasten**. I would like to just ask, and we will start over here with Dr. Karrah, and this is a yes or no question, I guess, and I will go across.

I just want, for the purpose of the record, do you all agree that the existing tort litigation system for resolving disputes as to long-term exposure with toxic products, your specialty, do you all agree that the existing tort litigation system is unsatisfactory for both manufacturers and for consumers?

Dr. **Karrah.** Senator, my position is the system has become unsatisfactory and it seems to be becoming more unsatisfactory. And it needs some help through this period.

Mr. **Nute.** As I indicated in my statement, this tort system has evolved to handle the everyday toxic torts that we deal with, but since it is the tort system it comes with all of the problems and abuses of that system, particularly in our area where most of our cases fall in the workplace and most of them are brought under failure to warn.

So I would strongly support some of the reforms in title III and then continuing with the existing system.

Mr. **Weill.** Yes, Senator, I do agree that it is not working.

Dr. **Lamm.** I think the current system is neither equitable nor rapid, and I think that the proposal at least is approaching these questions.

Senator **Kasten.** I would like to ask one other question and I know that at least two of the witnesses touched on the makeup of a group of experts, a panel, whatever we want to call this. But I want to ask the overall question on a broad basis.

Do you believe it makes sense—and I will begin with Dr. Lamm—to remove some of the complex scientific questions associated with long-term exposure to toxics, to remove those complex questions, generally speaking, from being dealt with 100 percent in the courts and to place them somehow before some panel of experts, because without quarreling about the makeup of the panel, I want to talk about the concept of a group of experts coming in instead of or in addition to the court system.

Dr. **Lamm.** I understand your question. I must say I have reservations of placing these decisions solely in the hands of experts. That type of concept is too important to be left to the generals.

I would also agree in my own area of etiology that the decisions on the judgments are too important to be left to the technical experts within the field.

Dr. **Weill.** Senator Kasten, I do believe that the concept of an expert panel is workable, not perfect but workable, and I do support it.

There are clearly questions of appeal and composition that will in fact perhaps deal with legal reservations concerning the final decision without any possible alteration or modification of that decision. But I think that contrary to trying to get highly technical scientific information adjudicated by people who should not have to bear that burden, I think the alternative of having scientists advise and perhaps just advise decisionmakers is sound, and I would support it.

Senator **Kasten.** Mr. Nute.

Mr. **Nute.** As the one lawyer among scientists, I will let the scientists answer.

Dr. **Karrah.** We agree there needs to be good science in the adjudicatory process and would like to see what is the best way to get that good science in. The science panel concept has some merit and probably could be utilized very effectively, but the way it is constituted in the present S. 1999 is not, in our opinion, the appropriate way to go.

Senator **Kasten**. I understand that there may be and will be differences of opinion in terms of the composition of the group. I guess the point I wanted to make and we have made it, is that we have got a giant step to go toward a panel and a group of experts in trying to decide how they would fit.

There had to be very strong and very broad consensus for putting these complex scientific questions in front of some group other than the courts until we can take the next step, which will be equally difficult, and that is to constitute that panel.

It is something that we have got to be working with.

Senator Pressler, do you have any questions for this panel?

Senator **Pressler**. I do not have any questions for this panel.

Dr. **Lamm**. Senator, I would support Professor Weill's position of recommending that the findings of the panel be considered advisory. I would recommend further that consideration be given that the charge to the panel not only be a determination as to whether causation has been demonstrated or not demonstrated more frequently.

I expect the panel to be in a position to say that there are certain knowledges that are not known, that are knowable, and that the outcome of the panel may well be to recommend specific research that ought to be done. Furthermore, to recognize that our level of knowledge develops over time, and questions should have an opportunity to be reopened both as in determinations where causation has been determined and in cases where it has not been determined.

Senator **Kasten**. Gentlemen, I am sure that we are going to be revisiting this overall question, and I am hopeful that you will continue to be in touch with us and continue to work with us as we try to find a middle group here.

Thank you all for your testimony and for appearing before the committee.

The next panel is made up of Mr. Mack, Mr. Marks, Mr. Buckmaster, and Mrs. Cox. We will begin this panel with Mr. Jim Mack, the public affairs director of the National Machine Tool Builders Association.

Mr. Mack.

STATEMENTS OF JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS ASSOCIATION, ACCOMPANIED BY KIM McCARTHY, LEGISLATIVE ANALYST; JONATHAN MARKS, PRESIDENT, ENDISPUTE, INC.; DUANE BUCKMASTER, DEPUTY DIRCTOR, FEDERAL MEDIATION AND CONCILIATION SERVICE; AND RICHARD LERNER, ASSOCIATE GENERAL COUNSEL, AMERICAN ARBITRATION ASSOCIATION

Mr. **Mack**. Good morning, Mr. Chairman. Accompanying me today is Kim McCarthy, who is NMTBA's legislative analyst.

The final results of our 11th Annual Product Liability Survey indicate that insurance premiums have risen by over 150 percent since last year and more than tripled since 1984.

Insurance costs are going to continue to spiral as long as the intolerably high transaction cost associated with product liability continue. And they will continue as long as there remains a wide variance and a total uncertainty in and among State law.

Based upon our survey results, we estimate that 100 claims filed against Machine Tool Builders would cost $10.3 million. That is, for every 100 claims filed against Machine Tool Builders, the current system provides $5.3 million to claimants and $5 million in transaction cost.

Under S. 1999, the cost of the same 100 claims filed against Machine Tool Builders would be $7.1 million—a $3.2 million saving. $5.3 million would still go to claimants under S. 1999. The savings would come from elimination of subrogation, reduced defense costs, and the limited 25-year statute of repose.

In other words, the approach taken by S. 1999 works for our members and for persons injured while using their products. I am, however, aware of concerns by other industries that the overly generous trigger mechanism contained in S. 1999 would likely substantially increase claims frequency in their industries.

An overly generous trigger mechanism would lead to more, not less, litigation, thus increasing, not decreasing, transaction cost. Therefore, Mr. Chairman, in order for this legislation to progress toward enactment, it must be responsive to the needs of a constituency which is broader that just capital goods manufacturers. We pledge with you to work to help achieve that consensus.

Recently NMTBA, as part of its involvement in the Product Liability Alliance, chaired a task force which considered recommendations for changes in the procedural aspects of titles I and II. We would like to take this opportunity to share these recomendations with the committee.

Detailed explanations are included in our written submission.

First, we strongly support S. 1999's inclusion of subrogation reform and the 25-year statute of repose for capital goods, both of which will reduce transaction cost.

Legal observers have for many years roundly criticized the subrogation of worker compensation claims. The compromise provided in S. 1999 is widely supported. However, language should be added clarifying how the escrow account in section 202(c) interfaces with the arbitration provisions of section 207.

A statute of repose limited to capital goods will put an end to excessive legal cost incurred by both sides in battling over issues concerning old, tired and often misused products which have typically passed through the hands of several owners.

With respect to the submission of claims, claimants should be required to provide the type of information currently requested by most insurance forms, so the manufacturer has the information he would reasonably need in order to evaluate the claim.

The manufacturer should also be entitled, upon request, to an independent medical exam of the claimant and a list of any expert witnesses the claimant intends to call.

With respect to arbitration, the baseball method of arbitration, we believe, is good public policy and should not be limited to situations in which the claimant is represented by counsel.

With respect to rights upon denial, although we support the objective of speedy resolution of title II claims, we seriously doubt that the method outlined in section 208(c) will work in achieving it. In order to reduce unnecessary transaction cost, section 208(d) should be amended to have the court determine the amount of manufacturer liability, instead of sending the matter off to arbitration after the court decides whether to make an award.

Exemplary damages should be made discretionary with the court, should be awarded, if merited, only if the manufacturer is found liable, and should be limited to 200 percent of the manufacturer's liability or $10,000, whichever is greater.

We have suggested some transition rules. Claimants who have tort actions pending prior to the effective date should be encouraged to avail themselves of the claim system, provided their actions have not been scheduled for trial. Finally, manufacturers should be permitted to toll the time limits imposed by sections imposed by sections 203(a) and 204(e) until 10 days after the Department of Commerce publishes the sample forms called for in the bill.

These recommendations are fair procedures which should apply, regardless of whether you choose to adopt a trigger for assessing the new claims system or a mechanism for forcing settlement of most claims for net economic loss.

Thank you, Mr. Chairman. We would be glad to respond to your questions.

[The statement follows:]

STATEMENT OF JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION

I. INTRODUCTION

Good morning, my name is James H. Mack, Public Affairs Director for the National Machine Tool Builders' Association (NMTBA). NMTBA's member companies account for more than 85% of domestic machine tool production. The industry represents a small but strategic segment of the nation's industrial capacity. The overwhelming majority of machine tool manufacturers are small businesses.

The nature of the product liability problem and the need for a federal solution have been amply documented in numerous hearings conducted by this panel in recent years. It was less than one year ago that we appeared before this Committee and urged your approval of legislation (S. 100) which we believed would "clean up" some of the product liability mess through the enactment of fair and balanced federal standards for the litigation of product liability claims. That legislation had been developed under the leadership of Senator Kasten and was the product of years of skillful compromise. However, action on it was deemed inappropriate until other mechanisms could be studied.

Many believed that the Committee's decision to defer consideration of S. 100 signaled the death knell for tort reform. They have been proved wrong by the significant legislative activity which has taken place since then concerning the development of alternative compensation mechanisms for injured persons unable to prove manufacturer fault in design and warning cases. And, although the debate goes on regarding the appropriate parameters for an alternative form of limited recovery, the discussion continues to be fueled by a realization that we all concede: the current system simply is not working.

Nowhere is the product liability problem more evident than in the current widespread lack of affordable—and, in some cases, available—insurance coverage. Insurers, like the product sellers they insure, are unable to accurately predict potential liability due to the pronounced disparity in state laws. Consequently, their rates are set conservatively to cover a "worst case" contingency. In some instances, insurers are unwilling to extend coverage to product sellers at any price. Surely the Committee is aware that, without insurance, product sellers may be bankrupted by a single product liability judgment—or worse, injured persons may have no way to fully recover their damages.

Thanks to this Committee's initiative and the leadership of Senator Kasten, the insurance ratemaking aspect of the product liability problem was addressed by the passage of the Risk Retention Act of 1981 (P.L. 97-45), designed to provide an equitable market solution to the problem of affordable product liability insurance coverage. The act facilitates the ability of product sellers to form self-insurance groups and purchase commercial insurance on a group basis. This additional competition in the insurance market will help ensure that product liability rates, now and in the future, will be determined on an accurate basis. However, it must be recognized that the ability of businesses to self-insure, while important, only points up the enormity of the problems created by the underlying tort system. Given the instability of the tort system and the resulting inability of reinsurance markets to predict their liabilities on any reasonable basis, it is unlikely that risk retention groups will be able to provide affordable, available coverage for many in the business community. Insurance costs will continue to spiral as long as the intolerably high transaction costs associated with product liability claims continue—and they will, as long as there remains a wide variance and a total uncertainty in and among state laws. Although calls for antitrust investigations of the insurance industry or for federal regulation of insurance may be "comforting" to those who make such proposals, they will do little—if anything—toward providing a meaningful solution to the product liability problem.

When we appeared before this Committee last year, we noted warnings from the insurance industry which indicated that annual record underwriting losses, coupled with a reduction in interest rates (resulting in a decline of investment income), would produce a substantial tightening of product liability insurance premiums. Those warnings have now become a fact.

The final results of our 11th Annual Product Liability Survey indicate that insurance premiums have risen by over 150% since last year and more than tripled since 1984. Premiums rose last year for the first time since 1979, and 1985 levels have exceeded the peak of the mid-1970's insurance crisis, when approximately 25% of NMTBA members were "running bare" due to their inability to obtain affordable coverage. Unlike the past several years, when about half our members were able to negotiate premium reductions, only four percent were able to do so this year.

The average premium—based upon 105 returns—is $151,900 (up 157% from $59,100 in 1985). The average metal forming premium is $121,600, while the average metal cutting premium is $164,500—more than tripling last year's average. Five in nine have deductibles or self-retentions averaging $76,300. One respondent in ten has no insurance at all (most because they found their carriers' proposals to be too expensive); and one in five have no umbrella policy! Thirty-seven percent anticipate problems with renewing their policies in 1986. One respondent in ten indicated that their policy basis have shifted from occurrence to "claims made"; and another 27% indicated that such a shift is anticipated when their current policies come up for renewal in 1986.

Seventy-three percent of the metal forming respondents and 49% of metal cutting respondents reported claims in 1985. Fifty-seven percent of the claims were reported by metal forming respondents, who represented only 28% of the sample. Seventy-seven percent of the claims were brought in State courts and 23% in Federal courts.

Of 201 closed claims reported from 1985, only 15% actually reached trial. Of these, our members won 47%. In other words, 8% of the total number of product liability closed claims have resulted in verdicts against our members—an average courtroom loss of $297,500—22% higher than last year's average award.

Fifty-eight percent of the claims were settled for an average of $91,100 (double last year's average settlement); 7% were won by our members in the courtroom; and the remaining 27% were dropped without awards being paid.

Moreover, the most recent Insurance Services Office (ISO) closed claims study shows that for every $6 paid out to claimants by insurance companies for product liability, another $7 is paid for lawyers and other transaction costs. Some insurance carriers may include a limit for defense costs in their policies—a departure from past practice.

Based upon these survey results, 100 claims filed against machine tool builders' "cost" $10.3 million—including $2.7 million in defense costs and $2.3 million in subrogation payments to employers and their workers' compensation carriers. In other words, for every 100 claims against machine tool builders, the current system provides $5.3 to claimants (less whatever they pay out in contingency fees, which average 33%) and $5 million in transaction costs.

NMTBA recognizes that the product liability crisis cannot be brought within manageable proportions until the law is stabilized through enactment of a federal statute governing the resolution of product-related claims. That is why we appreciate this opportunity to discuss S. 1999, the Product Liability Voluntary Claims and Uniform Standards Act.

We think the Committee will be interested to know that if S. 1999 were adopted—even with its overly-generous "trigger" for accessing the alternate claims systems—the "cost" of the same 100 claims filed against machine tool builders would be $7.1 million—a $3.2 million savings. This is so, even though 81% of the eligible claimants would collect net economic loss under the claims system (assumed to be the average of current settlements minus an estimated $2.3 million in workers' compensation benefits, which are today subrogated to the employer or his insurance carrier, regardless of employer fault), and 8% would likely still collect full tort damages under the tort system. As a matter of fact, $5.3 million would still go to claimants under S. 1999. The savings would come from elimination of subrogation, reduced defense costs and the 25 year statute-of-repose.

In other words, the approach taken by S. 1999 "works" for our members and for persons injured while using their products. This is so, because claims severity would be reduced by subrogation reform; because claims frequency would not be appreciably increased; and because transaction costs would be reduced. I am aware, however, of concerns by other industries that the overly-generous trigger mechanism contained in S. 1999 would likely substantially increase claims frequency in their industries. The resultant costs arising from such an increase in claims frequency would be unbearable—both for those industries and for society as a whole. An overly-generous trigger mechanism will lead to more—not less—litigation, thus increasing—not decreasing—transaction costs.

Therefore, in order for this legislation to progress toward enactment, it must be responsive to the needs of a constituency which is broader than just capital goods manufacturers. This Committee now faces a task which is clear, albeit difficult: to devise an alternative compensation mechanism which (1) significantly reduces transaction costs for industries in which a worker compensation offset is not available and latent injuries predominate; and (2) does not open the floodgates to claims to a degree which will nullify the savings in transaction costs.

II. PROCEDURES UNDER TITLES I AND II

Recently NMTBA, as part of its involvement in The Product Liability Alliance (TPLA), chaired a task force which considered recommendations for changes in the procedural aspects of Titles I and II. We would like to take this opportunity to share those recommendations with the Committee.

Mr. Chairman, we want to preface our remarks by commending you and your staff for your diligent efforts to keep the tort reform process moving forward and to develop workable legislation which will adequately accommodate a number of competing concerns. We understand that you intend the legislation as a starting point for further evaluation and that you anticipate extensive revisions before arriving at a finished product. It is in that spirit that we offer the following comments.

We should begin by pointing out that, in the process of evaluating the following procedures, we found that simplicity and fairness may, in some respects, be mutually exclusive. We, therefore, understand and appreciate the staff's efforts to set forth procedural safeguards—for both claimants and manufacturers—in painstaking detail. By and large, those provisions of S. 1999 on which we offer no comment have our approval, except that TPLA has not yet reached a consensus concerning the issue of effective dates—that is, whether the legislation should apply to injuries which occur after enactment or to claims which are filed after enactment. TPLA will defer taking a position until the system access and causation issues have been satisfactorily resolved.

Sec. 104 Record Retention

We understand and support the view that records pertinent to product liability cases should be maintained and that the willful destruction of such evidence should be discouraged. However, the provisions in Sec. 104 merely duplicate current record retention requirements imposed by federal regulation and evidentiary rules followed by federal and state courts which are designed to ensure that the above-mentioned objectives will, in fact, be met. We, therefore, believe that the requirements imposed by Sec. 104 are unnecessary and should be delted.

Sec. 105 Attorney Disclosure

The appropriate court for a claimant's action under Sec. 105(c) against his or her attorney is any court having jurisdiction over the attorney (not over the manufacturer).

Sec. 108 Expert Opinion

We strongly support S. 1999's moving the expert opinion provision to Title I, so that it applies to both the claims and the tort system. However, in the process of moving the provision, it was made to apply only to written expert opinion. Therefore, we urge a return to the Draft I language limiting the probative value of all expert testimony, while applying the provision to both Titles II and III.

Sec. 110 Product Liability Registry

In order to assure that the domestic manufacturer exemption applies correctly, the word "a" in line 8 of page 14 should be changed to "any."

Sec. 201 Expedited Product Liability Claims Procedure

The clear intent of the draft is to make pursuit of either a Title II claim or of a Title III tort action the claimant's exclusive remedy against all persons for personal injury arising out of the same incident. Sec. 201(c) should be amended to assure that this intent is not thwarted by permitting a claimant to file a Title III personal injury action against a manufacturer or product seller and then file a Title II claim against another manufacturer for the same injury.

Sec. 202 Manufacturer's Liability For Net Economic Loss

We agree with the compromise established by Sec. 202(c) when the claimant is unable to achieve a resolution of his or her workers' compensation claim within a reasonable time frame. However, language should be added clarifying how the 202(c) escrow account interfaces with the arbitration provisions of Sec. 207. Otherwise a principal reason for the compromise—precluding a court's or arbitrator's inaccurate determination of workers' compensation benefits—will be thwarted.

Sec. 203 Submission of Claim

In order to assure that the manufacturer receives proper initial notice of injury, Sec. 203(a) should require the use of certified mail, return receipt requested. Otherwise notice could be given verbally or to one who has no authority to accept it (e.g., a secretary or serviceman) and the ten day time limit would begin running. In addition, actual delivery of the forms to the claimant should be assured by requiring them to be sent by certified mail.

TPLA applauds the establishment through Sec. 203(c) of a fairly complete listing of the information a manufacturer would reasonably need in order to process and make a decision about paying a Title II claim. However, some items are missing. Since they are included on most insurance forms, their inclusion here should not be overly burdensome on claimants. These items include medical records within the control (not just possession) of the claimant; evidence of work history and earnings; and accurate description of the product and how it was being used; and, a list of the names and addresses of fact witnesses. In addition, the claimant should be required to attest that the list of items he or she supplies is complete (as well as being accurate) and should be precluded from submitting new evidence in a court proceeding he or she withheld from the manufacturer in the filing of the original claim.

Sec. 204 Duty To Disclose Information

In addition to the items already listed in Sec. 204(b), the manufacturer should be entitled, upon request, to an independent medical exam of the claimant and a list of any expert witnesses the claimant intends to call. The manufacturer should also be afforded an opportunity to interview the claimant and, where the product is within the possession or control of the claimant, an opportunity to inspect, photograph, or test it. Where the product is within the possession or control of another person (such as an employer), the Act should assure that the manufacturer is provided with all relevant information about it.

Sec. 207 Arbitration

The "baseball" method of arbitration is good public policy and should not be limited to situations in which the claimant is represented by counsel.

Pre-hearing discovery should be permitted, if the claimant has failed to comply with the provisions of Sec. 204. Otherwise the full facts of the case may never be provided to the manufacturer in advance of going to trial in a Sec. 208 proceeding.

Finally, if the manufacturer is the substantially preveiling party, he should be permitted to recover the arbitration fee from the claimant's attorney, as well as the claimant.

Sec. 208 Rights Upon Denial

In order to clarify that the defenses outlined in Sec. 205 are operable, the word "and" in line 10 of page 35 should be changed to "or."

Although we support the objective of speedy resolution of Title II claims, we seriously doubt that the method outlined in Sec. 208(c) will work in achieving it.

Sec. 208(d) and (e) should provide the same criteria for excusing failures to respond in a timely manner to Title II claims as is currently provided for failure to respond to a civil complaint within applicable time limits.

In order to reduce unnecessary transaction costs, Sec. 208(d) should be amended to have the court determine the amount of manufacturer liability, instead of sending this question off to arbitration.

We find highly objectionable the principal of requiring the court to award exemplary damages in cases in which liability is not established. Exemplary damages should be made discretionary with the court; should be awarded (if merited) only if the manufacturer is found liable; and should be limited to 200 percent of the manufacturers' liability or $10,000, whichever is greater.

We renew our request that the definition of "good cause" we suggested in our earlier comments be substituted for the definition contained in Sec. 208(e)(3). The definition we suggest is the one traditionally adopted by most courts.

Sufficient penalties already exist, if a manufacturer violates a court order enforcing a claimant's award under Sec. 208(d). Subsection (f) is, therefore, unnecessary and should be deleted.

We understand the concern that some consumer groups have expressed concerning "claims holding" by some manufacturers. Requiring settlements arrived at after a Sec. 208 action is commenced to be approved by the court could help discourage this practice, but the penalties prescribed in 208(q) are unnecessary and superfluous.

Sec. 209 Supplemental Claims

The section should be clarified so that a claimant is required to supply the same information to the manufacturer with respect to a supplemental claim as is required for submission of an initial claim under Sec. 203.

Neutral "Will Pay" Language

Settlements are likely to be enhanced, if language referring to "acceptance of liability," etc. were to be deleted and the more neutral "will pay" or "refuses to pay" language were to be substituted. Such language is, we believe, more consistent with the fact that manufacturer fault is not a predicate to recovery under Title II. We renew this suggestion with respect to Sections 206 (a) (b) and (c) and 209 (a) and (b).

Sample Forms

Wider transmittal and use by small businesses of the sample forms called for in Sections 203(a) and 204(e) would be accomplished, if the Secretary of Commerce were to be required to publish these forms in the Federal Register.

Transition rules

Finally, we suggest the following "transition rules":

1. Sections 203(a) and 204(e) should be amended to permit the manufacturer to "toll" the time limits imposed by those sections, until 10 days after the Secretary of Commerce publishes the sample forms.
2. Sections 201(c) and 105(b) should be amended to encourage claimants who have tort actions pending prior to the effective date to avail themselves of the claims system, provided thir actions have not been scheduled for trial.

III. MANUFACTURER RESPONSIBLITY FOR NET ECONOMIC LOSS

A. Access to the Expedited Recovery System

Designing a system in which limited recovery for product-related injuries is not predicated upon manufacturer fault is, essentially, a venture into uncharted territory. Consequently, it is not surprising that determining what constitutes a compensable event giving rise to a valid claim under the alternative system has proved to be among the most difficult and controversial tasks associated with this effort.

In this regard, NMTBA repeatedly has acknowledged that the machine tool industry's ultimate willingness to accept an alternative claims mechanism will be colored by the fact that machine tool related injuries are traumatic in nature and occur exclusively in the industrial workplace, thereby giving rise to the availability of worker compensation benefits. We continue to recognize that, for manufacturers and consumers of other products (especially those associated with latent harms), the process of devising an acceptable alternative form of recovery is considerably more difficult—particularly with regard to the difficult issue of causation.

While NMTBA is prepared to accept a product liability reform bill which includes both a tort and an alternative net economic loss component, we are concerned that the "trigger" in Sec. 205 which permits access to the alternative system remains overly-broad and unnecessarily complex. As currently drafted, the trigger is, in effect, a composite which incorporates an imputed knowledge standard of accountability with a risk/utility analysis and which shifts the burden to the manufacturer to show that the utility of the product outweighs its risks had they been known. We realize, Mr. Chairman, that it is your intention to construct an alternative system in which recovery does not rely on the claimant's ability to prove that the manufacturer was at fault—in other words, to adopt a true strict liability standard. However, the current language, combining as it does common law elements of strict liability analysis adopted by various states, results in a standard which borders on imposing absolute liability in situations in which the claimant's gross negligence cannot be proven. This standard fails to reflect the fact that even the most liberal jurisdictions recognize that the reasonableness of a manufacturer's conduct is a factor in determining liability in design and warning cases.[1]

Application of the risk/utility analysis in this context is particularly troublesome. Weighing the likelihood and seriousness of harm against the benefits derived from a product which perhaps, despite its risks, fulfills a societal expectation or need is too burdensome a process for a system designed to facilitate expeditious and less costly settlements. The risk/utility analysis invariably results in the infusion of complicated—and often diverse—economic analyses. You, Mr. Chairman, expressed this same concern during the February 26th hearing. We urge you, when evaluating the appropriate trigger mechanism, to bear in mind Senator Chris Dodd's recent observation that "simplicity is the key to workability here."

In addition, NMTBA believes that Sec. 205(b)'s requirement that the manufacturer bear the evidentiary burden of proving that the product in question was not unreasonably dangerous fails to take into account the overall compromise on which Title II recovery is premised: manufacturers accept responsibility for limited payment even though the claimant is not required to prove manufacturer fault. It seems to us that, in light of this conceptual trade-off, shifting the burden of proof on the issue of unreasonable danger (i.e., that the product was unreasonably unsafe) results in a deck that is stacked against the manufacturer to an unacceptable degree. Accordingly we urge that, in keeping with the vast majority of jurisdictions which apply strict liability principles, claimants should be required to prove that the product alleged to have caused injury is, in fact, unreasonably dangerous.

Furthermore, responsibility for payment should *not* be "triggered," if the unsafe aspect of the product was open and obvious; if the claimant voluntarily assumed the risk of known harm; if the claimant's failure to exercise reasonable care contributed to the harm; if adequate warnings or instructions were provided about avoidable or unavoidable risks; or if the risk in question was unknowable at the time the product left the manufacturer's control—a higher standard of liability than that imposed by traditional state-of-the-art analysis.[2]

B. Warnings

Sec. 205(b)(2)(B) recognizes that (1) certain risks to product users may be avoided if the manufacturer provides an adequate warning or instruction regarding safe use of the product; and (2) that, with regard to unavoidable risks, persons exercising reasonable care may make an informed decision whether to assume the risk if the manufacturer provided adequate information. There is, however, no reference regarding to whom warnings, instructions or information should be imparted. This is an omission which fails to reflect the fact that it is not always feasible to deliver product-related information directly to the product user, particularly when the product is used in the workplace.

NMTBA believes that Sec. 205 should require that warnings, instructions and other relevant information be given directly to the employee himself unless, in light of practical and economic difficulty and diminished likelihood that the product would cause harm (including the probable seriousness of that harm), a reasonable person would have given such warnings or instructions to an employer. A similar provision is already included in Title III.

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[1] See, *Feldman* v. *Lederle Laboratories*, 479 A.2d 374, 385 (N.J. 1984). The court observed that "once the defendant's knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant's conduct."

[2] *Feldman* v. *Lederle Labs.*, supra, at 386–387.

NMTBA views this clarification as a fair and balanced way of addressing the realities of actual workplace practice. It adheres to the prevailing rule of law that a warning must be given to the person best in a position to act on the warning and thereby avoid the harm. The fact is that in most instances, that person is the product user. However, in some situations, it is not. Whether or not warnings may be transmitted to a third person, such as an employer, depends in part on whether that person can reasonably be expected to take adequate steps to avoid the product user's harm or to ensure that the risk of harm is communicated effectively to the product user. Sec. 205(c), for example, expressly recognizes that, in the case of drugs or devices which can only be administered by a licensed practitioner, warnings or instructions need not be supplied directly to the product user.

Sec. 205(b)(2)(B) summarily refers to "adequate" warnings, instructions and information. Clearly, in order for product users to be reasonably informed, the information provided to them must be adequate. While we recognize that "adequacy" is essentially a question of fact which will vary according to the circumstances, we do believe that some further elaboration regarding the criteria for adequacy would be helpful.

IV. CIVIL ACTIONS

We noted at the outset of the process to develop an alternative mechanism to permit claimants to recover their uncompensated economic losses that, if the only practical difference between the tort and alternative claims mechanism is the level of damages to be paid, the objective of reducing litigation (and, therefore, transaction costs) would never be achieved. Thus, we argued, there is a clear need to establish simpler, tougher fault-based federal standards for civil litigation brought in the tort system—standards which would impose a demonstrably higher burden of proof on claimants than that required under the alternative claims system.

We are pleased to see that Title III of S. 1999 reflects that observation to a commendable degree. However, we call to the Committee's attention the fact that the Act fails to address the important issue of manufacturer liability associated with open and obvious dangers. The Act should make clear that product manufacturers have no duty to warn of such dangers.

The majority of states generally recognize that consumers have a responsibility to use products in a safe manner and that manufacturers should not be required to warn against obvious dangers which a reasonably prudent person should be able to discern and avoid. Nevertheless, product sellers are faced with an untenable situation in which they are liable in some states if they do not warn against obvious dangers, and are liable in other states if they do (because these courts believe that warning about obvious dangers "waters down" the effectiveness of more necessary warnings). A provision in Title III of S. 1999 which codifies the majority view and does not require warnings against dangers that are obvious will increase the likelihood that warnings against hidden or less obvious dangers will be heeded.

V. CONCLUSION

During the initial stages of the process to develop an alternative claims mechanism we voiced some concern regarding whether a consensus could be forged in which claimants were offered a choice of potential remedies for injuries caused by allegedly defective products. Although a number of objectionable provisions still remain, NMTBA believes that S. 1999 is a solid beginning and that, with further careful drafting, a fair and balanced consensus can be achieved. We remain committed to the pursuit of that goal because, as this Committee is well aware, the product liability problem will not go away. The problem demands a solution which fosters certainty, uniformity, equity and efficiency in the resolution of product liability claims. S. 1999 represents a significant step in that direction.

Senator KASTEN. Thank you very much.

The next witness is Mr. Jonathan Marks, president of Endispute, Washington, DC.

Mr. Marks.

Mr. MARKS. Senator, with your permission, I will follow my two colleagues to my left.

Senator KASTEN. All right. Is there a choice between Mr. Buckmaster and Mr. Lerner?

[No response.]

Senator KASTEN. We will begin then with Mr. Duayne Buckmaster, the deputy director of the Federal Mediation and Conciliation Service.

Mr. Buckmaster.

Mr. BUCKMASTER. Mr. Chairman and members of the subcommittee, my name is Duane M. Buckmaster. I am deputy director of the Federal Mediation and Conciliation Service.

I am here today to testify about FMCS mediation and arbitration processes. Federal Mediation and Conciliation Service is a small, highly specialized, independent agency established by the Taft-Hartley Act in 1947. Our mission is to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes.

To that end, FMCS offers mediation and conciliation services throughout the Nation. The service employs approximately 230 field mediators who are located in 76 duty stations in essentially every large city in the United States. In fiscal year 1985, our budget for the entire agency was about $24 million.

FMCS is probably best known for its mediation services. We actively mediated about 8,100 labor disputes last year. Based on our experience mediating labor disputes for almost 40 years, we believe that many disputes can and should be settled by the parties either with or without the assistance of a neutral third party.

Further, we believe that most disputes in labor relations or in other fields can be settled without formal litigation. Obviously, disputes which are settled by the parties are most satisfactory to both sides because the parties shape the resolution themselves.

FMCS also maintains a roster of private arbitrators for use by parties to collective bargaining agreements. Voluntary arbitration, whereby the parties select arbitrators, is a preferred method of dispute resolution in those cases where direct negotiation does not succeed. Voluntary arbitration has several advantages over court litigation. It is more responsive to the parties' needs, usually less expensive, and often quicker than litigation.

FMCS has maintained a roster of qualified labor arbitrators since 1947. These arbitrators are not employees of FMCS and are selected from our roster and paid for by the parties.

Presently, we have approximately 1,500 arbitrators listed on our roster. In fiscal year 1985, 31,222 panels were requested; 33,390 panels were issued. Arbitrators were actually appointed in 10,891 cases and we closed 4,406 cases in which an award was issued.

The FMCS cost for this activity was approximately $500,000. In essence, FMCS screens and maintains a roster of qualified labor arbitrators, establishes the rules and procedures by which the parties select an arbitrator, and provides panels to the parties.

The parties select the arbitrator. If they cannot agree, FMCS will designate an arbitrator to hear a case. Pursuant to FMCS rules, the parties and the arbitrator are responsible for the conduct of the proceeding, docketing matters, and so on.

FMCS also is responsible for the arbitration of pesticide data disputes pursuant to the Federal Insectide, Fungicide, and Rodenticide Act [FIFRA]. FMCS has arranged with the American Arbitration Association that the parties select FIFRA arbitrators from American Arbitration Association lists under general policy and regulatory guidance from FMCS.

While there have been few FIFRA cases, it is our belief that the process is working satisfactorily. S. 1999 provides in part that FMCS would establish and maintain a roster of arbitrators to resolve disputes in certain tort cases where liability is not an issue.

The role of the arbitrator would be to determine the net economic loss of claimants. The bill further provides that FMCS shall adopt rules applicable to the selection of arbitrators and the conduct of the proceeding.

The administration has not taken a position on S. 1999 and therefore FMCS does not either support or oppose the bill. As neutrals, we believe in mediation. We see it work every day. We also believe that voluntary arbitration is a fair and effective process, one which can and does work every day to resolve disputes quickly, fairly, and inexpensively.

This concludes my testimony. I would be pleased to answer questions about mediation and arbitration.

Senator KASTEN. Mr. Buckmaster, thank you very much.

Mr. Lerner.

Mr. LERNER. Thank you, Mr. Chairman. I am associate general counsel of the American Arbitration Association, and would like to take this opportunity to thank Mr. Buckmaster from the FMCS for the opportunity to work with them in the administration of arbitrations under FIFRA.

AAA was founded in 1926. It is a private, not-for-profit educational organization. We function through 26 regional offices around the United States. Last year we administered some 44,000 arbitrations, mediations, elections and the like, and did so with the assistance of members from our national panel of arbitrators, of whom there are some 60,000.

We endorse the concept of alternative dispute resolution in S. 1999. It is not the first Federal proposed or actual legislation which has such alternate dispute resolution procedures in it.

Mr. Buckmaster mentioned one. There are two other Environmental Protection Agency pieces of legislation which call for alternate dispute resolution, and two of them name the AAA as an administrative agency in their text.

The highlights of those statutes are included in the printed testimony which I submitted.

We would suggest that the section dealing with expedited dispute resolution be guided by the principle that it should not be perceived as a less advantageous forum for the resolution of the disputes proposed under the bill. The features of any proposed system such as discovery, provisions for attorneys' fees and expenses, and sanctions for nonmeritorious claims should be viewed from that perspective if the process is to work as its proponents properly hope that it will.

We would also suggest that all claims including those for property damage and commercial loss perhaps now includable within section 209 be specifically cognizable in an arbitration under the system where the parties have agreed in writing to do so.

We would also suggest that the arbitration provisions of this Act incorporate by reference the United States Arbitration Act, Title IX, U.S. Code. This would provide the statutory backdrop against which the arbitration provisions would operate unless there is an inconsistency, in which case the provisions of this bill would govern.

Many of the features of S. 1999 resemble New York no fault automobile insurance laws and its arbitration provision. That statute requires every insurance carrier doing business in the State and selling that coverage to offer to every one of its insureds an option to arbitrate any dispute which arises out of that first party coverage.

It is a structured concept, one which has a built-in mechanism, one which obligates an insurer to offer responsible alternative system to litigation. The Association has administered the arbitrations, advising thereunder under the direction of New York Superintendent of Insurance for the last 10 years, and does today some 7,000 cases around the State.

We would respectfully suggest that the drafters of this bill would want to examine that system, how it works, the coverages that it has, the kinds of arbitration process it uses, with an eye to enlisting its experience as it is hoped it would work in this bill.

We thank you for this opportunity to testify and of course we are pleased to answer any questions.

[The statement follows:]

STATEMENT OF RICHARD E. LERNER, ASSOCIATE GENERAL COUNSEL, AMERICAN ARBITRATION ASSOCIATION

I am Richard E. Lerner, Associate General Counsel of the American Arbitration Association. With me is Garylee Cox, the AAA's Washington, D.C. Regional Director. The AAA is a not-for-profit educational organization headquartered in New York City with 26 regional officies around the country. It was founded in 1926. The Association administers arbitrations, mediations, other alternative dispute resolution procedures and elections, in all 50 states. In 1985 the Association administered some 44,000 cases through its national panel of approximately 60,000 arbitrators.

We welcome this opportunity to comment on the role proposed for arbitration in Title II, the Expedited Product Liability Claims Procedure (Sec. 201 et. seq.) because the AAA has a long record of service to the citizens and courts of the states and the federal government of New York which dates from 1926. The federal statutes and regulations which call on the AAA to perform dispute resolution services are numerous and are highlighted in the material that follow.

The first federal law providing for arbitration of domestic disputes thereunder was the Amateur Sports Act of 1978. (36 USC 391,395). Title II, Section 201(b) provides.

"No amateur sports organization is eligible to be recognized as a national governing body unless it—

"(3) agrees to submit, upon demand of the Corporation, to binding arbitration conducted in accordance with the commercial rules of the American Arbitration Association in any controversy involving its recognition as a national governing body, as provided for in Section 205 of this title, or involving the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition as provided for in the Corporation's constitution and bylaws."

Title II, Section 205(c) further specifies:

"(c)(1) The right to review by any party aggrieved by a determination of the Corporation under the requirements of this section or section 201(c) shall be to any regional office of the American Arbitration Association. Such demand for arbitration shall be submitted within 30 days of the determination of the Corporation. Upon receipt of such a demand for arbitration, the Association shall serve notice on the parties to the arbitration and on the Corporation, and shall immediately proceed with arbitration according to the commercial rules of the Association in effect at the time of the filing of the demand, except that

"(A) the arbitration panel shall consist of not less than three arbitrators, unless the parties to the proceeding mutually agree to a lesser number;

"(B) the arbitration hearing shall take place at a site selected by the Association, unless the parties to the proceeding mutually agree to the use of another site; and

"(C) the arbitration hearing shall be open to the public.

"(2) The arbitrators in any arbitration are empowered to settle any dispute arising under the provisions of this Act prior to making a final award. If mutually agreed to by the parties to the proceeding and achieved in a manner not inconsistent with the constitution and bylaws of the Corporation.

"(3) Each constesting party may be represented by counsel or by any other duly authorized representative at the arbitration proceeding. The parties may offer any evidence which they desire and shall produce any additional evidence as the arbitrators believe necessary to an understanding and determination of the dispute. The arbitrators shall be the sole judges of the relevancy and materiality of the evidence offered. Conformity to legal rules of evidence shall not be necessary.

"(4) All decisions by the arbitrators shall be by majority vote unless the concurrence of all is expressly required by the contesting parties.

"(5) Final decision of the arbitrators shall be binding upon the involved parties, if such award is not consistent with the constitution and bylaws of the Corporation.

"(6) The hearings may be reopened, by the arbitrators upon their own motion or upon the motion of any contesting party, at any time before a final decision is made, except that, if any contesting party makes such a motion, all parties to the decision must agree to reopen the hearing if such reopening would result in the arbitrators' decision being delayed beyond the specific period agreed upon at the beginning of the arbitration proceedings."

The Toxic Substances Control Act (TSCA), 15 USC 2601 et seq., requires that when the EPA Administrator promulgates a test rule, all of the manufacturers, importers, and processors of the chemical which are subject to the rule are expected to jointly bear the cost of the test. If firms are unable to agree on the amount or method of reimbursement, section 4 requires the Administrator to issue reimbursement orders. This rule (140 CFR 790) establishes procedures and substantive criteria for EPA's determination of fair and equitable reimbursement.

When persons subject to a test rule are unable to agree on appropriate reimbursement, and request assistance, an informal hearing will be conducted by an independent hearing officer selected by the parties from a roster maintained by the American Arbitration Association. The procedures will be similar to those used in commercial arbitration, with some significant differences explained elsewhere in this notice.

The hearing officer will base his proposed order on the formula and criteria set forth in this rule. In general, a person's share of the test cost will be equal to his share of the total production of the test chemical. All costs incurred in meeting the requirements of the test rule, including a reasonable profit, will be eligible for reimbursement. A person who believes that the formula will not provide fair and equitable reimbursement in a specific case may propose modifications to it.

The hearing officer's proposed order will become the final agency order thirty days after it is delivered unless reviewed by the Administrator. Petitions for review will be automatically granted when the hearing officer's order is based upon a modified formula. Review will be discretionary in other cases. If a party's appeal is denial or lost, he may seek review in federal district court.

The Federal Insecticide, Fungicide, & Rodenticide Act (hereinafter "FIFRA") provides for the appointment of arbitrators by the Federal Mediation and Conciliation Service (hereinafter "FMCS" or "the Service") if the parties to a dispute regarding either compensation for the use or joint development of pesticide data cannot reach an agreement. FIFRA provides that the procedure and rules of the Service shall be applicable to such arbitration proceedings. (Pub. L. 95-396, September 30, 1978, Sections 3(c)(1)(D)(ii) and 3(c)(2)(B)(iii)).

The final (29 CFR 1440) rule established the procdure by which the Federal Mediation and Conciliation Service appoints arbitrators to assist pesticide producers in the resolution of disputes over the value of technical data concerning the properties and effects of pesticides or joint development of such data. (Exhibit Attached).

For this purpose, the Service utilizes as its roster of arbitrators the roster of commercial arbitrators maintained by the American Arbitration Association ("AAA"), a non-profit private organization with long experience in commercial dispute resolution. The FIFRA arbitration rules of the AAA are the rules of procedure to be followed for arbitration of pesticide data compensation disputes.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980. (Superfund).

Superfund is a comprehensive scheme under which the federal government is empowered to clean up hazardous toxic waste sites.

Section 112 "Claims Procedure" specifies claims handling methods and timelines. All claims which may be asserted against the fund must, in the first instance, be presented for payment ". . . to the owner, operator or guarantor of the facility from which a hazardous substance has been released." If no payment is received within sixty days of the presentation of the claim, the claimant may elect to sue the alleged "bad actor" or file a claim against the fund. If the claim is filed against the fund, and if no settlement is reached within forty-five days thereafter, the President may pay or deny the claim. If the claimant is dissatisfied with its award, or if the President denies the claim, he must submit the claim "for decision to a member of the Board of Arbitrators . . ." established by the President and ". . . selected through utilization of the procedures of the American Arbitration Association."

The law prescribes certain procedural essentials for these arbitrations. The hearings, to be held at a site selected by the President unless the parties can agree, must be "public." The hearings must also be "informal"and adherence to rules of evidence is not required. Testimony by deposition or interrogatory is expressly permitted.

The arbitrators are clothed with important powers under the law. They shall administer oaths, subpena witnesses and documents and, if they determine that further factfinding is essential to the determination of the claim, request the President to do so.

The arbitration decisions, though "final", may be appealed by any party, to the Federal district court for the district in which the arbitration was held, within thirty days of notification of the decisions. In such a proceeding the decision " . . . shall be considered binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of discretion . . ."

By regulation, the Environmental Protection Agency, at 40 CFR 305, has issued arbitration procedures to be effective March 13, 1986. The regulation provides an extensive role for the American Arbitration Association.

The Multiemployer Pension Plan Amendments Act of 1980 (Public Law 96-364, 29 USC 1001), which regulates certain circumstances in which contributing employers may withdraw from multiemployer pension plans, provides that "any dispute between an employer and a plan sponsor concerning a determination . . . (of the employer's withdrawal liability and some other matters) . . . shall be resolved through arbitration . . . conducted in accordance with fair and equitable procedures to be promulgated by the (Pension Benefit Guaranty) Corporation."

The Corporation has issued such procedures and approved the AAA's rules for the arbitration of these disputes. (Exhibit Attached).

The withdrawal liability provisions of MPPAA were upheld by the U.S. Supreme Court on February 26, 1986 in two cases: Connolly v. PBGC and Woodward Sand Co., Inc. v. PBGC (Nos. 84-1555 and 84-1467).

The Household Goods Transportation Act of 1980 (49 USC 10102 at 11711) provides for arbitration of disputes between shippers and cariers for loss and damage to household goods.

The Interstate Commerce Commission has by regulation approved two arbitration programs administered by the American Arbitration Association. (Exhibit Attached).

The arbitrability of patent disputes was aided when President Reagan, on August 27, 1982, signed Public Law 97-247, which specifically provides for the voluntary arbitration of a broad range of patent disputes, including questions of validity and infringement. The arbitration section of P.L. 97-247 (35 U.S.C. § 294) became effective on February 27, 1983.

Under this statute, parties to a contract may voluntarily agree to arbitrate their patent disputes, both pending and future, and such agreements and awards may be enforced under Title 9, U.S. Code. Such arbitration shall be private and the resulting award shall be final and binding. Awards are enforceable when notice of award is filed with the Commissioner of Patents and Trademarks. The award is binding only on the parties to the arbitration, and the parties may agree that the award will be modified if the patent that is the subject of the arbitration is subsequently determined to be invalid or unenforceable.

In 1984, the Congress expanded the scope of informal dispute resolution of intellectual property disputes when it enacted two statutes which became effective on November 8, 1984. The Patent Law Amendments Act of 1984 (H.R. 6286; P.L. 98-6220) adds new subsection (d) to 35 U.S.C. § 135 which provides for arbitration of patent interferences. The Semiconductor Chip Protection Act of 1984 (H.R. 6163; P.L. 98-620, 17 U.S.C. § 901 et seq.) sanctions litigation of disputes over royalties payable for innocent infringement of chip product rights unless they are resolved by voluntary negotiation, mediation, or binding arbitration.

The Department of Housing and Urban Development has by regulation (24 CFR 203, 221, 222, and 235) provided for dispute resolution.

"The Housing and Community Development Amendments of 1979 amended Section 203(B) (2) of the National Housing Act to permit a loan with a high loan-to-value ratio if the property is covered by a consumer protection or warranty plan. "Effective date August 25, 1980.

In order to be approved by the Secretary, plans must provide noncancelable insurance coverage for 10 years, paid for by the builder and automatically transferred to the home owner. Their protection plan must meet certain criteria including: (4) a system for complaint handling which includes conciliation and, if necessary to resolve matters in dispute, arbitration arranged by the American Arbitration Assocation or a similar body.

The National Oceanic and Atmospheric Administration of the Department of Commerce has by regulation (50 CFR 611.11) provided for binding arbitration of certain fishing gear damage disputes under the Commercial Arbitration Rules of the American Arbitration Association.

We recognize that this bill is a responsible attempt to identify a role for alternate dispute resolution of product liability claims. As such, the Association welcomes it.

We suggest that the drafters be guided by the principle that any such process should not be susceptible of being perceived as a less advantageous forum for the resolution of these disputes. The features of any proposed system—such as discovery, provisions for attorneys fees and expenses and even sanctions for non-meritorious claims—should be viewed from that perspective if it is to work as its proponents properly expect that it will.

The Association also recommends that all claims, including those for property damage and commercial loss perhaps includable in Sec. 209, be explicitly cognizable in the arbitration where the parties have agreed in writing in advance.

The Association also suggests that the arbitration provisions incorporate by reference the United States Arbitration Act, 9 USC 1-14. This will provide the statutory backdrop against which the arbitration provisions will operate unless ther is an inconsistency. In that event, this law would govern.

On behalf of the Association I wish to express our appreciation for this opportunity to appear before this Committee and present our views. We firmly believe that ther is a role for informal dispute resolution and arbitration in particular in a responsible legislative response to the concerns for product liability. We would be pleased to serve as a technical resource to this Committee and/or its staff in preparing the final detailed procedures for your consideration.

Senator **Kasten**. Mr. Lerner, thank you.

Now we will go back to Mr. Jonathan Marks, president of Endispute. Mr. Marks.

Mr. **Marks**. Thank you, Senator. I substituted here today for my Endispute colleague, Prof. Eric Green who is recovering from minor surgery. It was not quite as fast has he had hoped. He has submitted written remarks for this committee, and with the committee's permission I will append some written remarks of my own.

I would like to suggest to the committee that the problem that it faces in using or thinking about writing in alternative dispute resolution procedures into, for example, the claims side of this bill, is essentially a problem of evaluating the effects that those procedures might have on litigant behavior and the overall effects that those procedures will have in encouraging fast, effective, efficient and fair resolutions of certain kinds of disputes.

From our perspective as people who make their living in designing alternative dispute resolution procedures both for individual cases and on a systematic basis, the key is in fact to try to analyze carefully the incentives that particular kinds of procedures produce, and we want to suggest that it is worth thinking about that in the context of a variety of aspects of the bill and focus on that issue in the context of the provision of the bill mandating baseball high-low arbitration for handling claims.

I agree that the arguments in favor of baseball arbitration are clear. The arguments are that in forcing the arbitrator to choose between a demand and an offer provides an incentive for realism in the claimant's demand and in the respondent's offer and arguably serves to bring the parties members closer together and therefore has an incentive to encourage settlement negotiations.

There has been extensive use of baseball arbitration, both in public employee labor disputes and in professional sports, but I want to suggest to the committee that I have real doubts about whether it is the best mechanism for product liability claims arbitration.

First of all, I think there is mixed evidence about the effect of high-low or baseball arbitration in encouraging the parties to move closer together and settle. Some studies of the public employee area suggest that a substantial amount of gamesmanship come into play; that very often parties peg their final offers and demands in ways that tend to keep them apart rather than move them together; and therefore insofar as what one hopes by a baseball arbitration claims procedure as the final step on the claims side is that one facilitates negotiated settlements.

There is some question about whether that will actually work. Further, and I think more importantly, it is not clear to us that baseball arbitration is as good as other possible ADR structures for achieving the end of efficient and acceptable settlements of claims disputes over the amount of economic loss.

Baseball arbitration is very adversarial, as it does not encourage a cooperative approach to developing facts. It inevitably leads ultimately to an extreme win or lose element in the arbitration itself.

The arbitrator comes down on one party's side or the other. That is very different from traditional arbitration where the arbitrator has the discretion to set an award which takes into account uncertainties, strengths and weaknesses in what he or she has heard.

Now, this flexibility and discretion in traditional arbitration has been subject to criticism. The arbitrator has said too often to split the baby, but it does allow for the arbitrator to deal with the kinds of tough questions which are often presented and which I think will be presented in damages analysis under this matter.

There will often not be much question about actual lost earnings, days away from the job, but there will be substantial uncertainty as to whether an injury does or does not impede a claimaint from working at the present, whether the health impairment is permanent, about the degree of impairment, et cetera.

These are not questions which are subject to easy quantification. They are subjects which may be arguably better dealt with by leaving the arbitrator with flexibility. More importantly, I think, as is pointed out in my colleague Professor Green's testimony, I think there is a strong argument why the stautory system for claims handling ought to be a combination of mediation and arbitration and not a kind of one-step baseball arbitration approach.

I think that will achieve the best balance between the claims, between the ends a claim system would achieve.

I would mandate, were I designing the statute, a two-part mediation arbitration procedure very much like the ones which we have used in our Chicago regional office, very much resembling the procedures that Prof. Robert Keaton, now a Federal district judge, has used in his court in Massachusetts, essentially a preliminary settlement conference in which the arbitrator, on an informal couple of hour basis, hears both sides, works with both sides to try to probe strengths and weaknesses, and then tries to facilitate a negotiated settlement, including offering some reactions to the parties' arguments and perhaps even giving a settlement value, leaving then the parties the discretion not to reach a settlement, but to ask the arbitrator after a further hearing, taking of additional evidence, that the arbitrator might think appropriate, or offering additional evidence that the arbitrator might think appropriate, or offering additional evidence that the parties might think appropriate, leaving the arbitrator ultimately to make that decision.

I think there is substantial evidence that this kind of two-phased process in which the arbitrator serves initially as a settlement facilitator and mediator in very much the way that a judge does in a settlement conference, will have a substantial likelihood of increasing very greatly the number of matters which are voluntarily settled through negotiation and thereby reduce the numbers of matters which ultimately have to go to a win-lose hearing.

Thank you very much.

[The statement follows:]

STATEMENT OF PROF. ERIC D. GREEN

Thank you very much for inviting me to testify before this Honorable Committee on this very important subject—a bill to provide a uniform product liability law.

The proposed legislation addresses a very real and serious problem. There is no question that high costs, inordinate delays, unexplainable inconsistencies, and unacceptable uncertainties in the resolution of product liability claims have led to substantial unfairness and inefficiencies. These problems have helped to fuel the search for alternatives to the courts and to our fault-based system of compensation. See Goldberg, Green, & Sander, "Dispute Resolution," (Little, Brown & Co., 1985) Chapter 1, which discusses the so-called "litigation explosion" and the responses to it. Indeed, my personal experience as Special Master to Judge Thomas Lambros in the Ohio Asbestos Litigation has demonstrated convincingly to me that the traditional dispute resolution system, i.e. the courts and negotiation by lawyers on the courthouse steps, is simply inadequate to handle today's product liability cases.

The Committee staff and others form whom you have already heard have documented the nature of the problem sufficiently, so I will not repeat or criticize their assessments of the problem. Nor will I comment on the fundamental issues concerning appropriate substantive standards of liability and the principles of compensation and deterrence that lie at the core of any debate over product liability reform. These issues of substantive law and justice obviously are of vital political importance, but for now I leave these bigger issues to others. My comments today are limited to much narrower isues—the procedural mechanisms of the proposed uniform product liability law, S. 1999, and three of the evidenciary provisions of the proposed bill. As a teacher and writer in the fields of Dispute Resolution (see "Dispute Resolution" above) and Evidence (see Green & Nesson, "Cases, Problems & Materials on Evidence," (Little, Brown & Co. 1982)), these are the points on which I would like to offer some constructive suggestions. Besides, as Felix Frankfurter once reminded us, the history of procedure has been the history of justice.

Turning, then, to the dispute resolution mechanisms of the proposed bill, Title II establishes an expeditied claims procedure that leads ultimately to arbitration. Where the claimant is represented by counsel, the arbitration is final offer, or baseball, arbitration. Arbitrations are before a single arbitrator chosen form a list maintained by the Federal Mediation and Conciliation Service. The claims procedure may be initiated at the choice of the claimant. If the manufacturer admits liability but contests the amount of economic loss claimed, the procedure is mandatory on the manufacturer. If the manufacturer contests liability and denies the claim, to recover the claimant must file a civil action, in which case the manufacturer may be liable for exemplary damages equal to the claimant's net economic loss, if the claimant prevails, plus minor penalties. Under the claims procedure, a claimant may recover only his "net eocnomic loss," and nothing for pain and suffering or punitive damage. Compensation for economic loss received from other sources is deducted from the claimant's recoverable net economic loss. However, the claimant may recover his costs of processing the claim plus reasonable (i.e. hourly, as opposed to contingency) attorney's fees.

Apparently as a quid pro quo for no pain and suffering or punitive damages, the claims procedure is designed to have most claims resolved within 270 days, although in some cases—perhaps many cases—this time period can be greatly extended. To facilitate expeditious claims handling, cumbersome formal discovery is replaced by a more informal exchange of the crucial relevant information and medical records. And, most importantly, under Sec. 205, the issues of fault and punishment of the manufacturer are eliminated from consideration. (Nevertheless, there will still be fault-oriented disputes over the application of the "unreasonably dangerous" standard.) In addition, in toxic harm cases, problems of allocation of liability among manufacturers of the same kind of product are eliminated by dispensing with the need for specific product identification and by allowing a manaufacturer found liable for toxic harm in such situations to recover "on an equitable basis" from other manufacturers of identical products.

The proposed procedure is an imaginative attempt to eliminate many of the defects of the present product liability dispute resolution system by trading off many of the elements of the present system that one side or the other finds high obnoxious. From the manufacturers' perspective, unpredictable, unfair, runaway jury verdicts for punitive damages and pain and suffering are eliminated; from the claimants point-of-view, the long delays, high front-end costs, and huge fees taken out of the recovery are eliminated or reduced. Other incentives in the proposed bill are designed to encourage claimants and manufacturers to use the expedited claims procedure rather than the courts. And, recognizing that lawyers are the gatekeepers of the dispute resolution system. Sec. 105(a) mandates that attorneys disclose in detail to potential claimants who come to them for advice the pros and cons of the expedited claims procedures versus filing a civil action.

Any attempt to reform the product liability dispute resolution system by making it fairer to innocent victims and manufacturers and more cost-effective for society as a whole is laudable. The drafters of this bill deserve great credit for their ambition, creativity, and comprehensiveness of outlook. The expedited claims procedure, as an optional dispute resolution system, is certainly a step in the right direction. However, as I indicate below, any arbitration-based dispute resolution system has many of the same problems of an adjudicatory based system. In addition, even an arbitration system that is even partially compulsory creates additional problems, such as constitutional questions over right to a jury trial and due process of law.

For these reasons, I recommend that you consider a mediation-based system as an alternative or complement to the arbitration-based system in the current draft of the proposal bill.

The essential difference between mediation and arbitration, of course, is that arbitration leads to a final binding decision by a third party while mediation attempts to reach voluntary agreement between the parties through the use of a third party intervenor. See "Dispute Resolution," above, pp. 8–9, Chapters 3 and 4B, and Green, "The Complete Courthouse,' in "Dispute Resolution Devices in a Democratic Society," the 1958 Chief Justice Earl Warren Conference on Advocacy sponsored by the Roscoe Pound—American Trial Lawyers Foundation, a copy of which is attached.

Because arbitration is a form of private adjudication, parties must prepare for it and approach it armed for bear and in an adversarial posture, having expended whatever resources they can afford to try to win. At the same time, arbitration, at least as proposed in the bill, deprives the parties of many of the protections that they have become accustomed to in public adjudication (e.g., full discovery, jury trial). On the other hand, because no final decision will be imposed in mediation, the parties can approach athe process more cooperatively, less formally, and with less need for all of the due process protections of adjudication. Of course, in mediation, there is the possibility that the dispute may not be resolved. With arbitration, one is certain of a final outcome. But data taken from studies of a wide variety of cases indicate that well-run mediation leads to a resolution in the vast majority of cases—often, as many as 90% of the cases.

Mediation has many advantages over arbitration. First, as already said, it leads to a settlement acceptable to the parties, rather than an imposed decision. This is an advantage in itself because mediated settlement leads to greater party satisfaction with both the process and with the results. See "Dispute Resolution," above. 130-132. Party satisfaction promotes confidence in the dispute resolution process and stability in society as a whole. It also tends to promote compliance with the results. See "Dispute Resolution," above, pp. 524-533. Since post-judgment disputes and costs of collection are responsible for a large share of the total dispute resolution costs of society, increased compliance is a major factor to be taken into account when comparing mediation to arbitration or adjudication. Further, there is some evidence to suggest that mediation teaches people to resolve their disputes through negotiation, entirely without resort to a third-party. Negotiation, of course, is generally the preferable and most cost-effective way to resolve any dispute.

A mediation-based system also avoids most of the legal problems that a partially compulsory arbitration system, such as the one proposed in S. 1999, raises. Constitutional issues such as the right to a jury trial and due process are obviated with mediation because the process ends in a voluntary agreement. As long as the mediation is fairly conducted and no coercion is brought to bear on the parties to the mediation, constitutional challenges to the process are avoided. This is true even where engaging in mediation is compulsory, at least so long as no barriers (in the form of large sanctions) are imposed on the party who refuses to accept a mediated outcome. Compulsion into mediation is not equivalent to compulsion to abide by a particular outcome (i.e. arbitration). And data indicate that the resolution rate for mediation is not greatly affected by whether participation in the mediation is voluntary or compulsory. See "Dispute Resolution," above.

If mediation is unsuccessful, the parties may pursue other dispute resolution alternatives, including arbitration or adjudication. Mediation followed by arbitration is called "med/arb." Although there are problems with "med/arb" when the same person who is the arbitrator conducts the mediation, a dispute resolution process combining compulsory mediation followed by arbitration or adjudication before a different trier-of-fact may produce the best of both processes: an opportunity for a voluntary "win-win" settlement, and the certainty of a final outcome.

The question then becomes how best to design and structure such a combined "med/arb" or "med/adjudication" system for evident liability cases. Although there are some common elements to mediation in all kinds of cases, the differences among kinds of cases require that mediation be tailored for the kind of cases at hand. Unlike mediation of a neighborhood dispute or a family problem, for example, mediation of a product liability case must focus more on the legal merits of the claim than simply on reconciling interests and on uncovering simmering relationship conflict. For this reason, mediation organized along the lines of a Mini-Trail is more suited to resolution of product liability cases than mediation modeled along the lines of family, neighborhood, or labor mediation.

A Mini-Trial is a dispute resolution hybrid that combines many of the elements of negotiation, mediation, and arbitration in a new model. It is like nonbinding arbitration in that the parties, usually through counsel, argue the strengths and weaknesses of the claim and defenses to a neutral third party (called a "Neutral Advisor"), who then renders a nonbinding, advisory decision on the legal merits of the case. The parties then use this advisory opinion to help them settle the case. In the business context, where I helped develop the first Mini-Trail, see Green, Marks & Olson, "Settling Large Case Litigation: An Alternative Approach", 11 Loy L.A.L. Rev. 493 (1978), nonlawyer business representatives attend the Mini-Trial and try to settle the case even before getting the opinion of the neutral third party. ENDISPUTE and others have been very successful in using the Mini-Trial to resolve complex business cases, including product liability cases. Union Carbide Company used the process to settle nineteen related toxic harm personal injury cases. See Butler, "Using the Mini-Trial in Product Liability Litigation," 1 Alternatives 1 (1983). The Mini-Trial works because of its expedited, simplified structure, merits-focused approach, and no-risk procedure (like all mediation, the Mini-Trial is a confidential, inadmissible, voluntary procedure).

Mini-Trial type of mediation would adapt nicely to product liability, personal injury cases, as Union Carbide and others have shown. This is essentially what I and my co-Special Master, Professor Francis McGovern, and Judge Lambros have done in the Ohio Asbestos Litigation. There we used a computerized data base of closed asbestos cases as our "Neutral Advisor" to help the parties fairly evaluate pending asbestos cases. In the Ohio Asbestos Litigation, the parties settled without a single trial 100% of the pending asbestos cases within 1½ year of the start of the process.

A Mini-Trial type of mediation procedure for product liability cases has been worked out by the Center for Public Resources, a nonprofit organization that has as its objective reducing the costs and unfairness of litigation. This procedure is in the form of a model agreement for use in individual cases, but it is in essence, a model for Mini-Trial mediation that could be the basis for a legislatively-created expedited claims process. A copy of the CPR Model Agreement is attached. A major attraction of using this agreement or the Ohio Asbestos Litigation plan as a model for product liability legislation is that both are Mini-Trial mediation-based, involve none of the compulsion, or bindingness of arbitration, and they have been endorsed by leaders of the plaintiff and defense bars, by claimants and manufacturers, and by neutrals.

I do not suggest that Mini-Trial-mediation is a panacea for product liability cases. It is not. Any voluntary, nonbinding process in this area must be coupled with an expedited binding process that will resolve the disputes that are not settled in mediation and that will, by its very existence, make mediation work. This back-up process can be either streamlined adjudication or arbitration so long as the parties' rights to due process and, where applicable, a jury trial, are preserved. As long as the mediation is carefully constructed and well run by competent, experienced, and trained neutrals, the vast bulk of cases will be resolved in mediation, with only those cases that should be adjudicated being adjudicated or arbitrated.

On a related point which, based on my reading of the current draft, is obviously already a concern to the Committee, any dispute resolution mechanism must take into account the economic realities and incentive structure of the Bar. Discussion on this point usually focuses on the problems allegedly caused by attorneys operating on a contingent fee. While such lawyers may at times bring cases that are frivolous and may at times fail to settle cases at realistic amounts, in my experience it is the attorney being paid on an hourly fee basis-usually the defense lawyer-who is the greater barrier to cost-effective, expeditious dispute resolution. Elementary economics suggests why this is so. The contingent fee lawyer (assuming a full supply of cases) has every incentive to resolve cases as fast as possible in order to increase his return per unit of labor. The hourly fee lawyer has every incentive (in the short run) to view his cases as inventory with a limited shelf-life. The longer they run, the greater the return per case.

Personally, I believe that the vast majority of lawyers try to resolve their clients' cases as cost-effectively for the client as possible. Most defense lawyers see this not only as their professional obligation but also as in their long run interest. However, the short run economic incentives to exhaustively research and develop a case may be a powerful subconscious force on even the most diligent hourly fee lawyer.

I would like to comment on three additional provisions of the proposed bill dealing with the admissibility of evidence in product liability cases—Sections 107, 108, and 109.

1. Section 107 excludes evidence that a manufacturer has admitted liability or has made payment to a claimant for harm caused by a product under Title II.

This provision is overbroad. It should be limited to statements made in connection with attempts to settle or resolve a claim, as is Fed. R. Evid. Rule 408, on which this Section is based. As the Advisory Committee's Note to FRE 408 indicates, the Rule is designed to promote candor in settlement discussions and encourage nonjudicial dispute resolution. There is, however, an important distinction between admissions of liability in such contexts and admissions of liability in other contexts, which are always admissible. See Fed. R. Evid. Rule 801(d)(2) (Admissions by Party-Opponent). See generally Green & Nesson, "Teacher's Manual to Cases, Problems & Materials on Evidence," Ch. 1 Sec. G.

2. Section 108 provides that expert scientific or medical opinion is not sufficient evidence to establish any fact unless such opinion has support in peer-reviewed scientific or medical studies.

As phrased, this is a rule of sufficiency rather than a rule of admissibility. Thus it goes to the standards a court would employ in ruling on a motion for summary judgment or a directed verdict, rather than in ruling on the admissibility of expert opinion. Thus, I do not read this Section as an attempt to reimpose the largely discredited *Frye* rule (*Frye* v. *United States,* 293 U.S. 1013 (D.C. Cir. 1923)) in lieu of the balancing approach now employed under Fed. R. Evid. Rules 401–403, and which is favored by most federal courts since the adoption of the federal rules.

Seen in this light Sec. 108 is really a rule of substantive law setting forth a minimum standard of proof, rather than a rule of evidence. The approach of the proposed section finds support in the recent decision by Chief Judge Weinstein in the *Lilly* case, one of the cases in which the court granted summary judgment against an individual plaintiff who opted-out of the Agent Orange class-action litigation. The proposed section is designed to meet the problem caused by the ready availability of expert and medical opinion of any kind on any subject. However, it must be recognized that Judge Weinstein's approach in the *Lilly* case and Section 108's approach to this problem operate to substitute judicial decision on the weight of medical opinion for the traditional jury balancing of such evidence. This change will, usually to the detriment of claimants, bring novel claims which are not yet supported by thorough medical studies.

3. Section 109 excludes evidence of subsequent remedial measures to prove liability. Thus, it adopts the approach of Fed. R. Evid. Rule 407.

The trend among most evidence scholars and many jurists is away from the common-law approach excluding evidence of subsequent remedial measures, which was incorporated in FRE 407. Several state courts, in codifying their evidence rules along the lines of the federal rules, have departed from FRE 407 and have taken just the opposite tack. For example, Maine incorporated a contrary rule in its recent Evidence Code: "When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent measures is admissible." MRE 407(a). Noting that the rule is "directly contrary to Maine law," the advisor's note explains that the "public policy behind the rule against admissibility was that it would deter repairs. This rationale is unpersuasive today. In some instances subsequent repairs may be evidence of culpability." (Advisor's Note to MRE 407(a).)

The proposed rules of evidence for Rhode Island follow the Maine approach and would also admit such evidence. Moreover, recent developments in the law of product liability have caused some jurisdictions to interpret the evidence rule generally excluding evidence of subsequent remedial measures as inapplicable in cases where such evidence is offered to prove the existence of a defect in a strict liability case. The rationale for this exception is that the evidence is not offered to show "negligence." The leading case is *Ault* v. *International Harvester Co.,* 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974), interpreting Cal. Evid. Code § 1115.

There are no studies of which I am aware which show that the traditional rule affects primary behavior where the defendant is a product manufacturer. In the absence of such data, there is no reason to exclude obviously relevant evidence, which a trier-of-fact can weigh with all the other evidence in the case often bearing both side's explanation of its meaning.

In light of the different views on the admissibility of evidence of subsequent remedial measures, it would be a mistake to intrude on state choices in this area by making one national rule of evidence on product liability cases excluding such evidence. Were this to occur, states such as Maine and Rhode Island would have one rule of evidence for product liability cases and a different rule of evidence for all other cases. In the absence of a compelling argument for exclusion of such evidence, states should be free to choose the approach they favor.

Thank you very much.

Senator KASTEN. Thank you very much for your testimony. I want to go back to a point that Mr. Mack made and, Mr. Marks, you touched on it briefly.

But we are talking about the baseball method of arbitration, and Mr. Mack pointed out he does not want it limited to the situation where the claimant has a lawyer. I know you have some questions about the method itself, but try to address the narrower question that it should not be limited just to places where you have a lawyer.

Others are suggesting that it should not even be used at all, even where the claimant has a lawyer.

Could you—starting with Mr. Lerner—could you just address those two specific points? Should it be used only with a lawyer, both with or without a lawyer, or not at all?

Mr. LERNER. I think the association's reaction would be that it be used with or without a lawyer. So that again, the arbitration claims procedures may not be perceived as a second-class forum.

Senator KASTEN. Mr. Buckmaster, do you have a different slant on that at all? I know you are all part of the same overall group and approach to these issues.

Mr. **Buckmaster**. No. I think I would agree with the remarks that have been made here.

Senator **Kasten**. Mr. Marks?

Mr. **Marks**. I confess, in reading the bill, I did not understand what the rationale was for using a baseball approach solely when there was a lawyer. I think the arguments for and against the baseball approach apply whether a lawyer is present or not, and I might add that I think there is no bar from a procedure of the kind I have suggested which sets an initial settlement conference using the arbitrator, and thereafter essentially says if you do not settle through a facilitated negotiation process with the help of the arbitrator, then the two final numbers which are on the table will become essentially the offers between which the arbitrator has to decide.

I confess I have less problem with that than I do with the situation where one goes directly to a kind of final offer approach because I think that that has an increased likelihood of voluntary settlement.

Senator **Kasten**. Mr. Mack, let me just switch. You have been working on product liability longer than most of us on this side of the table have.

Just off the subject of this particular panel, in the beginning of your statement you gave us some statistics about the growing product liability problems. How would you describe the problem today? It is clearly worse than it was 2 or 3 years ago when we began. And specifically, are you now seeing significant numbers of people going without insurance or unable to get insurance?

Mr. **Mack**. Senator, I think you need to differentiate between escalating insurance rates and problems associated with the tort system which we believe to be the underlying cause of the insurance difficulties that many of our members are experiencing. That has been a problem for some time and it is getting worse.

The claims data that we shared with you indicate that the cost-per-claim cost is going up.

The second problem that we are seeing is in exploding insurance affordability or availability problem. The fact that insurance during the early 1980's was readily available and the fact that our members could, during the early 1980's, negotiate down premium proposals based upon their own claims experience, frankly tended to mask the underlying tort problem.

You are hearing today from people all over the country who are today experiencing the symptom of the disease. The disease is that we have a tort system which has run amok. That is the problem that you have been providing over the past several years some considerable leadership in trying to resolve.

I would say that the tort problem, and the insurance availability/affordability problem are worse today than they were 5 years ago, and they will continue to get worse.

Senator **Kasten**. Do you have any measures, Jim, of how many people in your industry, now are going without insurance?

I know you can define the statistics the way you want, but we have been hearing that people are just unable, or in certain cases unwilling, I guess, to pay the exorbitant premiums. But is it 5 percent, 2 percent, 10 percent, half?

Mr. MACK. Our survey was taken in December. One respondent in 10 indicated that they have no insurance at all, most because they found their carrier's proposals to be too expensive.

One in five have no umbrella policy. Thirty-seven percent indicate that they anticipate problems with renewing their policies in 1986. One respondent in 10 indicated that they have been shifted from an occurrence to a claims made policy, and anothe 27 percent indicated that such a shift is anticipated when their current policies come up for renewal in 1986.

Back in the late 1970's, one in five was going bare. It has not reached that proportion based upon the survey data. It may well by the time the year is out, unless you do something to solve a tort system which has run amok.

Senator KASTEN. Senator Pressler, do you have questions for this panel?

Senator PRESSLER. Yes, I do.

Let me say, first of all, that I would also like to insert in the record, letters from three groups that support my amendment. The Motor Vehicle Manufacturers Association of the United States has submitted a letter endorsing the amendment. The FMC Corporation has sent a letter, and the Crumm & Forster Insurance Co. have sent an analysis and a letter which I ask unanimous consent to place in the record at the approriate point.

Senator KASTEN. Without objection, the material will be placed in the record at the appropriate point.

Senator Pressler: Mr. Chairman, let me say that I have several of my mayors in town today and one of their key issues is this issue of product liability insurance and liability insurance. They are not in the room at this moment, but earlier today I quoted from some of the problems that mayors and county officials are having, and it is interesting that the group of officials from the Municipal League of South Dakota, their number one issue is product liability insurance and the kind of problems we are discussing today.

I would like to address some questions principally to Mr. Mack. First of all, let me ask you, several groups have urged that I extend my joint and several liability amendment to apply to title II in addition to title III.

Is such an approach workable and would you support broadening of the amendment?

Mr. MACK. Senator, I'm not sure I understand how it would apply to title II. I think your amendment is commendable and we would support it.

As I understand the way that title II, as it is currently developed, works: the claimant decides that he or she is going to bring an action against a manufacturer, and the claimant is then prohibited from bringing a product liability action against any other manufacturer (or, for that matter, any other person) the same harm section 211 permits a manufacturer, who has either been found liable or who makes payment, to distribute that loss among other persons based upon their share of the fault and as I read it, without providing for joint and several liability.

It may be that others would have other feelings on this but my own reading is that under Title II, joint and several is not a permissible. This, of course does not mean that some court, would not misapply a joint and several liability doctrine under title II, just as they have, as you very forcefully argued that they have in the current situation.

Senator **Pressler**. Since most States now apply comparative rather than contributory negligence, shouldn't it be reasonably easy to apportion damages among joint defendants on the basis of the percentage of contribution to the cause of plaintiff's damages? And that I would address to Mr. Mack or anyone else who wanted to comment on it.

Mr. **Mack**. Courts do it. In those 37 States that have some form of comparative fault, courts do allocate fault on some percentage basis among the various parties. As you pointed out, it arguably made sense when it was an all or nothing proposition and courts were not in the business of allocating fault on a percentage basis among various parties, that a joint and several doctrine was a way to assure that the claimant got recompensed.

As you suggest courts are making these allocations anyway, it makes sense to have those allocations of fault apply to final the allocation of damages. The problem in our case is compounded by the fact that usually the employer has been responsible for the accident. But the employer is not in the courtroom and arguably should not be in the courtroom because of the worker comp limits on liability.

But if you have a situation where the employer was responsible for 60 percent of the claimant's harm, but 100 percent of the damages are allocated against the five of us here at the table: you have already got the 60 percent of the fault not properly allocated for purposes of damages. Then to come back to me or to Ms. McCarthy and say, "well, now we are going to get the whole thing from you," just is not fair.

Senator **Pressler**. My time is up. I have some other questions for the record. And I would just ask one more quick one, probably of Mr. Mack.

In your view, does joint and several liability apply when there is no evidence of parties acting on concert, collusion, common design or any other element of connection among the defendants?

Mr. **Mack**. Courts have certainly applied it that way. That was not the way I think it was originally intended, but courts have certainly applied it that way. And as you have pointed out, in South Dakota and elsewhere around the country, one of the principal reverse beneficiaries of that misapplication has been the taxpayers of communities who are socked with the whole load, so to speak, in cases in which the community may have been responsible to some small extent for a claimant's harm.

Senator **Pressler**. Thank you, Mr. Chairman. I ask unanimous consent to ask additional questions of this panel for the record.

Senator **Kasten**. Without objection, so ordered.

I would like to thank all of the members of this panel. We will be back in touch with you with questions submitted for the record. Thank you all very much.

Our next panel is Mr. Nuzzaco, Mr. Whiston, and Ms. Lipsen.

Our witness on this panel is Mr. Mark Nuzzaco, the government affairs director of the National Printing Equipment & Supplies Association.

Mr. Nuzzaco.

STATEMENTS OF MARK J. NUZZACO, GOVERNMENT AFFAIRS DIRECTOR, NATIONAL PRINTING EQUIPMENT & SUPPLIES ASSOCIATION INC.; RICHARD WHISTON, VICE PRESIDENT-GENERAL COUNSEL, OTIS ELEVATOR CO.; AND LINDA LIPSEN, CONSUMERS UNION

Mr. Nuzzaco. Thank you, Mr. Chairman. My name is Mark Nuzzaco. I am government affairs director of the National Printing Equipment & Supplies Association, Inc., which is the national trade association of companies engaged in manufacturing equipment and supplies used in the graphic arts industry.

Our industry is dominated by small businesses. Almost 60 percent of our 248 members are companies with annual gross sales of $5 million or less.

I appreciate your invitation to testify today on one aspect of the bill that is particularly troublesome for members of our industry and could be devastating in cost for most small business manufacturers in this country, the record retention provision in section 104. Let me tell you why this is true.

Small businesses already are overburdened by thousands of statutes and regulations that currently require retention of records. Many small businesses operate with minimal staff and office personnel. Keeping cost down is critical in order to enable them to compete with larger companies.

Even some of our larger members doubt that they would be able to tolerate the burden. Small companies simply cannot afford to hire the personnel and rent the storage space that would be needed in order to comply with the requirements of section 104 of S. 1999.

The process of creating a new product takes years. From the time a new concept is developed, throughout the subsequent years of testing, reports and testing data are constantly generated. These volumes of documents often are incorporated into the final engineering specifications of the product.

A liberal reading of section 104 would require a manufacturer to retain every single document generated during this process. Even if a small business could identify the types of documents that need to be retained, there would be no office space in which to store them.

Furthermore, the 25-year period for retaining documents is too long and is arbitrary. It certainly does not relate to any ordinary business use that might be made of such documents.

Typically, product development information is retained in a myriad of files that relate to the different functional characteristics of a product. While accessible for ordinary engineering and maintenance inquiries related to specific components, no single file represents the complete documented history arguably called for by section 104.

In fact, industry manufacturing engineers tell us that if section 104 were to become law, a company would have to create a new separate central filing system solely for the purpose of complying with the statute.

The problem of storing the documents that could be subject to the broad recordkeeping requirements in S. 1999 would add enormous expense to a small company. In addition to the problems of maintaining documents, it would be virtually impossible for our small business members to locate appropriate documents in the massive files that would be required for the purpose of this provision.

A company would not be able to ask an ordinary office clerk to locate a document that was being requested for production. A more highly trained and compensated professional who knows about the design and manufacture of our product would have to do this.

Aside from the fact that the record retention provisions would create enormous burdens for small businesses, they are unnecessary. Numerous record retention and reporting requirements already exist under various regulatory schemes, such as the Toxic Substances Control Act, the Food, Drug and Cosmetic Act, and the National Traffic and Motor Vehicle Safety Act.

In fact, one source entitled "Legal Requirements of Business Records", catalogs in no less than 782 pages some 2,800 Federal statutes and regulations that already require record retention of some type.

Thus, the provisions in section 104 are clearly duplicative of existing requirements. At a time when the general mind set in our country is against expanding regulation by the Federal Government, duplicative Federal record retention requirements are particularly unnecessary.

Because section 103(d)(2) states that the bill does not preempt any other Federal law except the Federal Employees Compensation Act, the record retention requirements in the bill may apply only to products not subject to other Federal record retention requirements. Thus, different manufacturers may be subject to different requirements and a single manufacturer of different products may be subject to different requirements for his various products.

Finally, the creation of an adverse inference, when destruction of a document was not willful or was not in bad faith, is simply unfair. This extends the adverse inference rule beyond the scope of current law, creating an inference that the facts in a document were adverse to the party who disposed of the document is in essence a punishment for disposing of the document.

This punishment should not be imposed when the company did not act in bad faith and had no malicious intent.

We would like to submit for the record a Product Liability Alliance legal memorandum that provides a detailed legal analysis of the existing regulatory requirements and spoliation of document sanctions.

We strongly urge section 104 be deleted from the bill. We can appreciate the fact that section 104 was drafted with the best of intentions. It is simply wrong for any business to destroy records in an attempt to hide wrongful conduct: But section 104 represents duplicate, unnecessary overkill to address this problem.

Thank you.

Senator **Kasten**. Thank you very much.

Our next witness on this panel is Mr. Richard Whiston, the vice president-general counsel, Otis Elevator Co.

Mr. Whiston.

Mr. **Whiston**. Good morning, Mr. Chairman, and thank you for inviting me to testify on the record retention provisions of S. 1999. My name is Richard M. Whiston and I am the vice president-general counsel of the Otis Elevator Co. I am sure you recognize the Otis name. We manufacture, sell and service elevators and escalators worldwide and have over 300 offices throughout the United States alone.

Our marketing people tell me that Otis Equipment moves the equivalent of the U.S. population every 4 days.

In my current and past capacities at Otis, I have had extensive experience in the practical aspects of maintaining and utilizing documents that relate to escalator and elevator safety. On the basis of that experience, I can assure you that the record retention provision in S. 1999 will create enormous unnecessary and costly burdens on American businesses, burdens which must be passed along in increased prices for goods and services.

The committee should know that the current laws already require manufacturers to retain pertinent documents. This extensive list of laws imposes strict penalties if relevant documents are wrongfully destroyed in an attempt to avoid civil or criminal responsibility.

What you may not appreciate is that it is in the company's best interest to keep relevant documents in addition to those required by law, not just to comply with the law, but because in the overwhelming majority of cases records relating to the safety record of our products assist us in litigation.

Our records demonstrate the lengths to which we go to make our products safe and what we do to maintain them in a safe condition. However, not all documents need to be saved. Common sense, not the law, should be the deciding factor.

The record retention provision in S. 1999 appears to have been drafted under the mistaken assumption that the manufacturers do not keep records. This is simply not the case in the real world. We do everything we can to maintain documents for as long as there may be any litigation in which they are likely to be used.

This brings me to a second point. The litigation process, albeit it slow, does not require the retention of documents for 25 years. We would have to set up huge warehouses, literally, to store the quantities of documents produced in our 300 offices around the country. This is especially true since the bill does not provide any clear guidance as to what type of records must be retained.

If there must be a record retention provision in the bill it should be specific about the type of documents manufacturers must retain. The bill is not clear as to whether the record retention provision applies to foreign manufacturers. If it does not, it discriminates against U.S. manufacturers. The enormous burden imposed by this provision could cause U.S. manufacturers to move their operations overseas.

If the provision does apply to foreign manufacturers, it may be difficult to administer and enforce. In any case, if a provision of this type is included, it should apply to both foreign and domestic companies.

The provision also does not recognize that many records may be misplaced or destroyed in the ordinary course of business. Certain documents may be discarded before the company gets notice that there was an accident or has any reason to believe that the documents may be relevant to future litigation.

The mere fact that a company disposed of a document before it had reason to believe it would be relevant to litigation and the inference that is created thereby might be the main factor in a jury deciding against a defendant. This could occur, even though the document may have contained facts that would have helped the company win its case.

Aside from the fact that this provision is extraordinarily burdensome, impractical and unfair, it will not create any measureable benefits. As I stated earlier, companies are required to and, as a practical matter, do retain necessary records. Plaintiffs' lawyers typically subpoena records of prior similar actions.

Many times this is a tactic to harass defendants by forcing them to spend hundreds or thousands of man-hours searching documents. Our experience has shown that when the documents are made available to the plaintiffs 'lawyers to do the search themselves, they do so in less than one-tenth of 1 percent of the cases.

If this bill were to require companies to maintain all of their records for a period of 25 years, they would have to be stored in huge warehouses and plaintiffs' lawyers would be even less likely to want to go searching through these stacks and stacks of files.

The main point I want to make today is that Congress must understand the implications of this type of broad-sweeping record retention requirement. Arguably, under section 104, every piece of paper and on every desk in each of our 300 offices could be relevant in a later lawsuit.

A routine letter notifying us that a light went out in an elevator cab on a single location could possibly be relevant in a lawsuit 20 years later. No matter how innocent a document may seem, it may turn out to be subject to the record retention rule.

For example, a single employee in one office somewhere in the country could write down his opinions about the safety or risks of a particular product. His opinion may be complete speculation without any basis in fact or any testing or study. The fact that he put his opinion in writing does not mean that his opinion is correct.

There would have to be a separate staff of lawyers to supervise all of the paperwork in the company, making sure that rebuttals are attached to any incorrect documents before they are filed and retained.

Of course, this would be economically impracticable and unmanageable for most companies.

In conclusion, let me state that the underlying purpose of the record retention provision can be met by current State and regulatory requirements, by legal rules that impose sanctions for the destruction of evidence, and the practical need that companies have to retain relevant safety documents.

At a time when both Congress and the executive branch of the Federal Government are particularly sensitive to unnecessary and costly regulatory and recordkeeping requirements, this provision would represent a giant step backward.

Under any cost/benefit analysis, this provision loses. It would be an extraordinary, unnecessary costly burden for large business and an absolute disaster for small businesss.

Senator **Kasten**. We can put you down as undecided. Is that right, Mr. Whiston?

Our next witness is Linda Lipsen, representing the Consumers Union, Washington, DC.

Ms. **Lipsen**. I represent Consumers Union, the organization which publishes Consumer Reports magazine. We joined with CFA, Public Citizen's Congress Watch, and USPIRG in a written statement which we submitted in a previous hearing on S. 1999.

I am pleased to be here with you today to discuss what consumer organizations believe to be the single most beneficial feature of S. 1999—the record retention provision contained in section 104. We commend you, Senator Danforth, for seeking to correct a serious problem for consumers who are pursuing remedies through the courts—the unavailability of business records.

Record destruction is an exceedingly common and unfortunate phenomenon which presents a huge obstacle for plaintiffs seeking to uncover the facts of their case.

In a survey questionnaire to the American Bar Association, more than 50 percent of those responding answered that they either often or always encounter compliance programs that further policies that reduce historical records.

Similarly, a legal scholar from Cornell Law School recently reported that document destruction programs have been institutionalized into such innocuous sounding programs as preventive maintenance or law compliance, and may include a schedule to eliminate—and I quote—"misleading, improvident or erroneous documents for the purpose of optimizing the corporation's position in the event of litigation."

In a recent book about the Dalkon Shield tragedy, Morton Mintz described the vanishing document problems:

> Thousands of documents sought by lawyers for victims of the Dalkon Shield sank from sight in suspicious circumstances. A few were hidden for a decade in a home basement in Tulsa, Oklahoma. Other records were destroyed, some admittedly in a city dump in Columbus, Indiana, and allegedly in an A.H. Robins furnace.
>
> And despite court orders, the company did not produce truckloads of documents for judicial rulings on whether the women's lawyers could see the papers.

S. 1999's provisions on record retention would require manufacturers to retain documents for 25 years which assess risks or hazards connected with their products. This section would also establish sanctions against manufacturers who wilfully destroy documentary evidence by requiring the court to levy monetary penalties.

It also would allow the imposition of rebuttable presumptions that the destroyed evidence would have established the fact adverse to the position of the violator. Further, the court may impose this presumption where evidence was negligently destroyed, if no other means are available to establish the fact at issue.

I cannot underscore the importance of records for establishing the facts of a case. In product liability lawsuits, the discovery of documents enables lawyers to catch witnesses who lie or stretch the truth, remind witnesses who forget, and replace witnesses who die or are unavailable or beyond the jurisdiction of the court.

The availability of documents is even more critical in product cases involving injuries occurring long after the initial exposure to the product. In these long latency situations, a witness's testimony concerning the manufacturing and sales decisions made years prior to the lawsuit is a poor substitute for records taken contemporaneously for manufacture and sale of the product.

When documents are destroyed or unavailable, the result is simply more searching time concerning discovery because secondary sources of evidence must be relied upon. Furthermore, where documents are destroyed or unavailable, there is a higher likelihood of error by the fact-finder.

If this provision were enacted, settlement prospects, we believe, would be enhanced, since the manufacturer might not want to risk the imposition of adverse presumptions which would attach in subsequent cases involving the same product.

Parties to the litigation might then be encouraged to come forward promptly with requested documents in order to avoid the imposition of the monetary penalities and unfavorable presumptions of S. 1999.

At the very least, the provision would cause manufacturers to reexamine the wisdom of their decisions to destroy or hide evidence. At the very best, manufacturers might react more responsibly and take the necessary safety precautions to correct flawed products where records warn of a potential hazard.

We realize this provision is not a panacea for curing all of the woes of the costly delay-producing discovery process and difficult problems of proof. Before penalties, for instance, could be imposed plaintiffs would be faced with the burdensome task of proving that the document once existed and the document was destroyed.

Additionally, plaintiffs would still have extreme difficulty identifying the evidence to search for and how and where to find it—which may be like finding a needle in a haystack.

We also have no doubt that this provision would not affect manufacturers' use of the various privileges for avoiding or delaying information disclosure, or would discourage the pursuit of protective orders which bottle up evidence, or would cause manufacturers to admit facts already proven in prior lawsuits.

Mr. Chairman, there are numerous statutes and regulations presently which require preservation of business records but providing you with a list of such rules clearly misses the point. Most of these statutes and regulations are intended to help Government officials monitor and enforce compliance with substantive regulation and provide information for Government rulemaking. These rules, for the most part, apply to specific products, not to all products that are capable of causing injury.

The methods of enforcement, penalties for noncompliance, the type of documents which must be stored, the amount of time these documents must be stored, all vary a great deal from regulation to regulation.

More importantly, most of these provisions do not expressly provide for private enforcement and courts have generally not found such a right. Government agencies do not have the occasion to enforce these document requirements, short of initiating a rulemaking proceeding or bringing some action against the company.

On the other hand, individual plaintiffs have a direct interest in uncovering relevant documents. Therefore, the availability of this provision in private litigation would make requirements of other recordkeeping statutes that much more effective.

Thank you very much.

Senator KASTEN. I would like to thank all three of you. We have some additional questions that we may submit to you. We just simply are out of time, but the question that I wanted to try to get the two of you to respond to in writing is: Are there any suggestions that you have that we could have some kind of a record requirement, but that there would be possibly more specific and possibly less broad, and possibly easier to work through, or are you simply opposed to the record retention requirements concept?

I hope that we can just explore that a little bit more, but I would like to thank you all very much for your testimony here today. We are going to leave the record of the hearing open for two weeks, not only for this panel but the entire hearing this morning, during which time we may submit questions to the various members of the panels and they are going to be asked to get back to us promptly.

We thank all the witnesses today. The hearing is adjourned.

[Whereupon, at 12:05 p.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

MACHINERY AND ALLIED PRODUCTS INSTITUTE,
Washington, DC, January 22, 1986.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

DEAR CHAIRMAN DANFORTH: We appreciate the opportunity to comment on Staff Working Draft No. 2 of the "Product Liability Voluntary Claims and Uniform Standards Act." In order that the committee and its staff may understand fully the point of view from which we consider this proposal, permit us to say a word about the Institute.

The Machinery and Allied Products Institute (MAPI) is the national spokesman for the capital goods and allied product industries. In recent years, our membership has been substantially extended beyond traditional capital goods to include such product lines as electronics, instruments, basic metals, medical and dental equipment, computers and related gear, airplanes and aircraft engines, etc. For the whole of our membership and their customers, products liability is—and long has been—a serious problem. We are therefore deeply appreciative of the Senate Commerce Committee's efforts to achieve uniform federal standards for the judgement of products liability questions. Our comments are offered in the hope that they may be of assistance to you and your staff in this effort.

Although Staff Draft No. 2 represents some improvement over No. 1, it seems to us that further refinement of the proposal is indicated. By now it appears to be a given that only some kind of a two-ply combination of voluntary claims and uniform products liability standards has any chance of serious congressional consideration much less passage, at least at this time. As in the case of our statement on Staff Draft No. 1, these comments are offered in recognition of this reality *and not because we consider the current proposal preferable to uniform products liability standards alone.*

Let us hasten to add that we are altogether sympathetic with the broad objectives of this proposal as outlined by Senator Danforth's statement on the Senate floor on December 20, 1985. We too favor the limitation of excessive legal costs, the reduction or elimination of noneconomic damages such as pain and suffering, punitive damages and loss of consortium, a speedup in the process of compensating persons injured by defective products, and so on. We emphasize this aspect of our general approach at the outset lest our statement—which contains some considerable criticisms of the proposal—seem captious and wholly negative.

Our comments which follow are divided into certain general comments and several specific ones.

GENERAL COMMENTS

Liability for harm under voluntary claims system

As we have said before, if the proposal for adoption of a voluntary claims system were to be adopted, society's system for righting private wrongs would take a long step into the unknown—to an uncharted void roughly midway between our present tort system and total no-fault as practiced in New Zealand.

The essence of the proposal is set out in a December 20, 1985 statement by Senator Danforth on the Senate floor.[1] "The basic idea is to establish uniform standards for product liability litigation, and *at the same time, to get as many people as possible out of the courts* and into a simple, expedited claim system that provides swift and more certain recovery without the costs of protracted litigation." (Emphasis supplied.)

To induce " . . . as many people as possible" to employ the voluntary claims procedure, the scheme would employ both the carrot and the stick. The carrot—presumably an incentive to both parties—is summarized in the statement quoted above in these words, " . . . a simple, expedited claim system that provides swift and more certain recovery without the cost of protracted litigation." Senator Danforth's comments describe another kind of carrot in these words, " . . . the standard of recovery would be much easier to meet *and there would be greater certainty of recovery*." (Emphasis supplied.) This seems a rare hybrid creation that is both a carrot to attract the claimant and a stick with which to flog the manufacturer.

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[1] Congressional Record, December 20, 1985, p. S18321.

All this, we think, requires some comment. One apparent central purpose of the voluntary claims proposal is to present the manufacturer with a near-irresistible trade-off. In return for acceding to the claimant's demand and paying his claim, the manufacturer is rewarded by a quicker and less costly settlement. But if the goal is to provide greater certainty of recovery by establishing " . . . a standard for recovery [which] would be much easier to meet," it seems to us very possible that the manufacturer may end up by paying more—and perhaps many more—claims than he has in the past.

The all-purpose carrot-and-stick to which we have just alluded is defined by the interplay between Section 203 and 205 of this Staff Draft. The first of these sections, labeled "Submission of an Expedited Claim," prescribes the preparation of a "complete claim"[2] by a claimant. Aside from an itemized recapitulation of costs, the following is required: "reasonable proof that the manufacturer made the individual product unit that caused the harm" and "full information regarding the date, place and time of the harm's occurrence, the cause, nature and extent of the harm and the nature and amount of economic loss caused by the harm." It is with the second of these two elements of "proof" that we have difficulty. The asseverations called for are likely to be unsupported—and, of course, unexamined—assertions and yet they are the very heart of the claimant's case. We think this "standard of recovery" would indeed be easier to meet. It may well be too easy.

Now let us consider relevant portions of Section 205, "Liability for Harm." The claiment having asserted his demand, the manufacturer has 90 days within which to investigate the claim and decide whether to pay the claim in full, pay it in part, or reject it altogether. Any such claim is free of the examination accorded such claims in a lawsuit and thus consistent with a standard for recovery that is " . . . easier to meet."

This built-in bias favoring the claimant is magnified by the proof required of the manufacturer were he rejects a claim. Section 205 declares the manufacturer liable if the product, when it left the manufacturer's control, was "unreasonably dangerous" and this unreasonably dangerous aspect of the product was the proximate cause of the claimant's harm while the product was being used in a manner and for a purpose intended by the manufacturer or which could be reasonably anticipated by the manufacturer. This is, of course, a strict liability standard with "proof" apparently supplied by presumption since nothing is said of this in Section 203 on "Submission of an Expedited Claim."[3] In any event, it appears that, if the claim—once made—is rejected and the claimant decides to sue under the provisions of Section 208, the manufacturer assumes the burden of proving by a preponderance of the evidence that its product was not unreasonably dangerous. But his proof is subject to the rules of evidence, cross-examination, and the discipline of the courtroom.

Given the nature of the proposal, it may be that the very significant differences in the amount and quality of proof required of claimant and manufacturer cannot be overcome. However, it clearly is a difference and it in turn is one of several factors likely to produce varying reactions among manufacturers. One may believe that benefits claimed for the voluntary claims approach-reductions in overall cost, in time consumed by claim settlement and lessened risk of some catastrophic loss, to name three—justify its cooperation in such a system. Another manufacturer may agree that all of these beneficial results may be expected but still hold that they are insufficient to offset the damage to corporate and product reputation which this near no-fault plan may produce. A third manufacturer, possessed of only limited faith in human nature, may so fear being "taken" by claimants under this plan that its response to almost every claim will be, "we'll see you in court." With this scenario of differing reactions—and it could be extended—we believe that, rather than doing away with what Senator Danforth has called a "lottery," the gigantic game of chance that tort law has become would be continued, if not aggravated, by this proposal.

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[2] Sec. 203(c), Staff Working Draft No. 2.

[3] We acknowledge that this may be dealt with in the claims forms ultimately devised by the Secretary of Commerce.

The Insurance Problem

In our comment of August 9, 1985, we pointed to the current crisis in liability insurance and its potential effect on this new proposal. A few additional words of reminder seem in order.

Bad as the present situation is—and it is very bad—underwriters have a base of experience on which to rate risks and determine premiums. With the expedited claims procedure there will be no baseline of experience from which actuarially to rate risks. Nor is that all—or even most—of the problem. Recent losses sustained by the property/casualty insurance industry are so devastating that the Insurance Services Office, Inc. in a February, 1985 study entitled. "The Coming Capacity Shortage," anticipates that "Available property/casualty insurance may fall short of demand by $62 billion over the next three years." In short, that mechanism by which society spreads the risk of loss from products liability is in a state of disrepair.

We trust that committee has brought the property/casualty insurance industry into this study of Staff Working Draft No. 2 because it is an indispensable part of any solution to the whole products liability problem.

"The Worst of All Possible Worlds?"

Section 105 of the proposal, labeled "Attorney Disclosure," would arm the client-claimant with a right of action for damages against his attorney if that worthy "fails to disclose to a client the information required by this section . . . ." Such information includes an explanation of options available under Titles II and III of the Act, and, as to both:

(A) the elements of proof and potential recovery under such options;

(B) the time periods specified in this Act for payment if the client submits an expedited claim under title II of this Act;

(C) the length of time that is likely to be required for the client's recovery in a civil action under title II or title III of this Act; and

(D) an estimate of the likelihood of the client's recovery pursuant to such options; and

(2) an estimate of the attorney's time, fees, and expenses, and all other potential costs, expenses, and penalties payable or to be paid by the client seeking recovery under title II or pursuant to title III of this Act.

We think that this would likely become a toothless sanction and, given the Law of Unintended Consequences, make a bad situation worse.

By requiring counsel to explain to the client-claimant the relative expenditures or losses of time and money under the differing approaches of Title II and Title III, it is evidently intended to tilt decisions toward voluntary claims and away from lawsuits. Counsel may be depended upon to make the required disclosure in most cases. But suppose he doesn't; the client-claimant is not likely to exercise a right he doesn't know he has. Let us suppose that the client, after full disclosure by the lawyer, opts to sue—and losses. Is the amount of the voluntary expedited claim foregone—with interest added—the measure of the client's "loss" which triggers exercise of this special action for damages? We doubt if this is a "loss" because litigation is, in Senator Danforth's words, "a lottery" in which the client consented to buying a ticket after due explanation of the options. Moreover, you may be sure that the standard contingent fee contract—authorized by Section 202(e)—will be altered to include exculpatory language which covers the lawyer's backside.

Today the most dubious claims are winnowed out by counsel at the original consultation with the client. Counsel has no stomach for pursuing over months or years a claim that has only an outside chance of prevailing in court. But with the advent of a voluntary claims procedure, counsel has a new opportunity. With so much to gain and so little to lose—in time and money—counsel will pursue claims on a voluntary basis that he would once have dismissed summarily. Only the better cases, those in which he reckons the odds of winning are favorable, will be brought under Title III. In this "worst of all possible worlds," the total number of claims will increase, the won/lost ratio of lawsuits in Title III will show an increase in the "won" column, and the overall costs to society of products liability will increase still further.

DETAILED COMMENTS

Our comments on certain specific provisions of Staff Draft No. 2 appear below.

Record Retention (Section 104)

This proposed section would required manufacturers to: ". . . retain for a period of twenty-five years one copy of all studies or reports within a manufacturer's possession, custody, or control, which assess the risks or hazards posed by the design or formulation of the product. A manufacturer of such a product also shall retain for a period of twenty-five years a record of each reported incident of death, injury, or illness resulting or alleged to have resulted from the use of the product."

By restricting the retention requirement to "one copy of all studies or reports" etc., Staff Draft No. 2 is a distinct improvement over Staff Draft No. 1. However, it is still likely that over time records of this character will become massive users of expensive space. We recommend. therefore, that the regulation authorize the use of microfilming or similar photographic reduction of records. Second, the 25-year requirement makes no reference to settlement or adjudication of an incident involving death. Persumably, upon settlement or adjudication, records relating thereto could be destroyed. Why not say so?

Expedited Product Liability Claims Procedure (Section 201)

Workplace accidents.—A claim of the type comprehended by this proviso cannot be filed in an "employee of the product's manufacturer who suffers such harm in the course of his employment. . . ." This appears to bar the use of the expedited claims procedure in the case of workplace accidents, at least those claims filed by the injured workman personally. How about his survivors or a spouse claiming "mental anguish or emotional harm" resulting from the workman's injury and, in turn, ". . . causing the claimant's personal physical illness or injury"? It is to be noted that this exception to the general rule is evidently related to the fact that worker's compensation serves as the exclusive remedy for the workman under a wholly "no fault" system. However, workplace accidents are the most expensive of all products liability claims representing some 11 percent of total claims but 42 percent in total payout.[4] If they are excluded from the expedited claims procedure, a very considerable portion of the presumed savings from use of the system will be lost.

Foreign claims.—We support the objective of Section 201(a) which states *inter alia,* ". . . no claim for harm occurring outside the United States may be brought under this title by a person who is not a citizen of the United States." Evidently, this proviso is intended to prevent the influx of expedited claims from abroad where the veracity of such claims would be even more difficult to prove than would be the case in the United States and for other *form non conveniens* considerations. However, the provision as written may be inconsistent with U.S. statutory and treaty law. As for statutory law, 42 U.S.C. Section 1981 states, in part, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to sue . . . and to the full and equal benefit of all the laws and *proceedings* . . . as is enjoyed by . . . citizens. . . ." (Emphasis supplied.) As for U.S. treaty law, Article IV of the Treaty of Friendship, Commerce and Navigation between the United States and West Germany says, "Nationals . . . of either party shall be accorded national treatment with respect to access to the courts of justice and *administrative tribunals* and agencies within the territories of the other Party. . . ." (Emphasis supplied.) This potential conflict of laws should be addressed immediately.

Submission of an Expedited Claim (Section 203)

We are told by Section 103(c) that "This Act supersedes any State law regarding recovery for any injury or damage caused by a product only to the extent that this Act establishes a rule of law applicable to any such recovery." The proviso quoted above concerning a voluntary claim with a manufacturer of a product causing harm which cannot be indentified appears to fall clearly within the exception to the general rule. In short, it ". . . establishes a rule of law applicable to any such recovery."

This means that the rule of law announced by the California court in the *Sindell* case would be adopted as a remedy available to any claimant availing himself of the expedited products liability claims procedure.

The *Sindell* decision is the law in California and has been adopted in a handful of other jurisdictions. However, it is *not* the rule in the majority of U.S. jurisdictions and has been expressly rejected by a number of them.[5] Significantly, we think, the market share liability theory may not be availed of by a claimant who files a civil action in court under Title III.

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[4] Insurance Services Office Product Liability Closed Claim Survey, Report No. 9, p. 60.

[5] "Market share liability has been rejected by most courts as an ill-conceived solution based on policy grounds, not legal precedent." 11 Ohio Northern University Law Review 148.

Liability for Harm (Section 205)

This section, in establishing the rules for assessment of liability, would hold the manufacturer to a standard of strict liability while the claimant, insofar as the use of the product is concerned, is only required not to have ". . . acted in some material respect in a manner which was a gross failure to exercise reasonable care." Only gross negligence on the part of the claimant would bar his claim.

This difference in liability standards applicable to the manufacturer and the claimant is unfair on its face. Both parties should be held to the same standard.

Supplemental Expedited Claims (Section 209)

The open-ended character of the liability for supplemental expedited claims will, we think, adversely affect the viability of the entire voluntary claims proposal; it is likely to be a serious disincentive to use of the expedited procedure. If a manufacturer can see no end to its liability, it will be likely to decline the assumption of liability in the first place. Draftsmen of the proposal should provide some means of arriving at the present value of future expenses so that the manufacturer, who otherwise would be inclinded to pay up, can dispose of the matter. Where such a present value calculation is impossible, a Title III lawsuit seems to be the only alternative.

Time Limitation on Liability (Section 210)

The proposed statute of repose applicable to expedited voluntary claims would be set at 25 years. This is too long a period of time, in our judgment, and should be reduced to no more than 15 years.

Uniform Standards of Manufacturer Liability (Section 302)

Staff Draft No. 2, in the main, retains in Section 302 the approach of Staff Draft No. 1 by specifiying a strict liability standard only for breaches of express warranties, and a negligence standard for other cases. However, with respect to manufacturing or construction defects, language has been added which appears to make this standard strict liability in result, even if it is not so named. Specifically, under the standard, the manufacturer will be found negligent in constructing a product if, when the product left its control:

(1) it deviated in a material way from the design specifications or formula of the manufacturer or from otherwise identical units manufactured to the same specifications or formula; and

(2) the manufacturer does not establish by *clear and convincing evidence* that it exercised reasonable care in the product's construction. (Emphasis supplied.)

Under Section 102(3), clear and convincing evidence is defined as ". . . that measure or degree of proof that will produce in the mind of the trier of fact [a firm] [6] belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy such standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt."

We have no objection to the factors which the plaintiff must establish. They are consistent with the principle of eliminating the heavy and often unneeded evidentiary burden that may be placed upon plaintiffs. However, the provision departs from reasonableness and any semblance of fairness when it requires the manufacturer to demonstrate its care through clear and convincing evidence. This provision should be changed to return the evidentiary burden faced by the manufacturer to that enjoyed by the plaintiff—"a preponderance of the evidence."

Government contractor defense.—We strongly endorse the decision of the committee and/or its staff to include in the bill paragraph (i) to Section 302, which would establish in statutory form the so-called government contractor defense. Under the terms of this provision, there would be, in general terms, a complete defense to the government contractor if:

1. the product was acquired by the federal government for an aerospace or defense application;
2. the government established or approved reasonably precise contract specifications material to the claim; and
3. the product conformed to such specifications in all material respects.

Under these circumstances, the contractor would have no liability unless the claimant could prove by a preponderance of the evidence that the federal government was not informed by the contractor of dangers material to the claim which were known to the contractor but not to the federal government.

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[6] The bracketed words, "a firm," were included in Staff Draft No. 2 as distributed for comments but were omitted from that version of the proposal appearing in the Congressional Record of Decemberr 30 at p. S18410.

This provision would enact into statutory form the substance of the "Agent Orange" test enunciated by Judge Pratt in the U.S. District Court in Brooklyn during the litigation in that case.[7] That defense has been recognized, in varying degrees, in subsequent decisions by a number of federal courts in other areas.

Initially, we felt that the enactment of the governmenmt contractor defense in statutory form was highly desirable even though it appeared that the federal courts, and possibly the state courts as well, were likely to adopt the rule judicially. At an early point, howeer, it became apparent that there were differences in degree among the federal circuits as to how the terms of the defense were spelled out, even though these differences initially did not appear to be significant. But, very recently the U.S. Court of Appeals for the Eleventh Circuit, in *Shaw* v. *Grumman Aerospace Corporation,* issued an opinion which, although paying lip service to the government contractor defense, has modified it to a degree which we think makes it virtually unworkable.[8] In essence, that court has decided that a contractor can avoid liability, even though it has complied with the government's specifications, only (to quote the court's opinion):

> . . . if it affirmatively proves: (1) that it did not participate, or participated only minimally, in the design of those products or part of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

In view of this opinion, we think it has now become absolutely necessary for Congress to make the government contractor defense applicable by statute, and for that reason we are gratified by the decision to include pargraph (i) in the bill.

Punitive Damages (Section 305)

In general, we support the proposed punitive damages proviso. Save for the "Alabama exception" embodied in Section 305(e), punitive damages can be assessed only where there has been an award of compensatory damages. This is a very reasonable rule and might also serve as a measure by which to limit punitive damages. A multiple of compensatory damages should serve as a ceiling on such damages, and we suggest twice compensatory damages as the proper cap because that is consistent with the rule spelled out for the measurement of exemplary damages in Section 208(e).

In concluding, we want to reiterate a declaration made at the beginning of this statement. We are altogether sympathetic with the proposal's objectives, and the present situation in products liability demands prompt congressional action. However, as we have tried to make clear, we have some serious reservations about how the voluntary claims scheme might work in practice. The dangers to which we pointed deserve, we submit, the most careful consideration by the committee and its staff.

Finally, we want to express our appreciation for this opportunity to comment on Staff Draft No. 2 of the proposed "Product Liability Voluntary Claims and Uniform Standards Act." If the Institute or its staff can be of any further assistance, you have only to ask.

Respectfully,

CHARLES STEWART, *President.*

CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION,
Washington, DC, February 26, 1986.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR DANFORTH: We at the Chemical Specialties Manufacturers Association (CSMA) are writing to you concerning the second staff working draft (S. 1999) on product liability.

CSMA has a membership of nearly 400 firms engaged in the manufacture, formulation, distribution and sale of aerosols; antimicrobial products; automotive chemicals; detergents and cleaning compounds; pesticides; and waxes, polishes and floor finishes. Specifically, CSMA member companies represent the consumer side of the industry and market their products on a nationwide basis.

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[7] 534 F.Supp. 1055.

[8] No. 84-5803, December 19, 1985.

We would like to take this opportunity to applaud the Senate Commerce Committee's effort to come up with viable product liability reform legislation. We agree with you that "the growing crisis with respect to the availability of liability insurance only underscores the urgent need for product liability reform." CSMA supports the enactment of an equitable and balanced Federal product liability law and we appreciate your leadership in this area.

CSMA understands that the purpose of S. 1999 is to "promote further discussion and study by all those interested in product liability reform." We are also aware that other associations, groups and manufacturers will submit very specific comments based upon a section-by-section analysis of the bill. With this purpose in mind, we would like to limit our comments to addressing the overall approach taken by S. 1999 and, specifically, Title II of the bill.

We realize that S. 1999 is an effort to combined product liability reform with a cost effective alternative to tort litigation. If successful, such an effort could produce a system which provides claimants with a swift means of recovery and which reduces transaction costs for both claimants and manufacturers. Any alternative to the tort system, however, must not drastically increase transaction costs and it must not allow claims for which recovery from a private party cannot be socially justified.

CSMA does not believe, however, that the standard-or trigger-in Title II accomplishes the above goals. The Title II standard of liability would give rise to a great deal of uncertainty and, consequently, increased transaction costs. The number of claims that would be brought under Title II would be difficult, if not impossible, to predict.

Given the problems and difficulties in constructing an appropriate standard or trigger, we urge the Committee to examine several different approaches to product liability reform. For example, various settlement forcing mechanisms that do not rely upon a trigger have been suggested. Or, a different standard of Title II liability may be more appropriate.

CSMA recognizes that need to move quickly on this legislation. We do not believe, however, that it is too late for the Committee to consider all the various approaches to product liability reform.

CSMA is optimistic that a critical examination of the different approaches to product liability reform will lead to a workable proposal. CSMA supports the product liability reform effort and we would welcome the opportunity to assist the Committee in this process.

Sincerely,

RALPH ENGEL, *President.*

P.S. We respectfully request that this letter be introduced in the official hearing record for S. 1999.

NORTHWESTERN UNIVERSITY SCHOOL OF LAW,
Chicago, IL, March 5, 1986.

Senator JOHN DANFORTH,
Senate Commerce Committee, Senate Office Building, Washington, DC.

DEAR SENATOR DANFORTH: This letter responds to the challenges posed by Panel I on February 27th. It has four parts. First, I respond to your request for particularized comment on the staff working draft as if a law of that general sort were inevitable. Second, I comment on the Gorton bill as a better approach, again assuming that a statute of that general sort were inevitable. Third, I make my own suggestions based on the same assumption. Finally, I mention some general reactions in response to the panel and the discussion that followed. *Nothing of what I say in this letter represents a retrenchment on my basic position: that a general federal products liability law would be a serious Congressional mistake.*

I. You have asked me to assume that the basic framework of the staff working draft represents a bill that will become law, and to criticize specific provisions. I pretty much follow the chronological order of the provisions to which I refer.

1. The attorney disclosure provisions in § 105 seem to me particularly unfortunate. They make the client's decision almost impossible in an uncertain and complicated case, and they create potential expenses to the client that are unjust and perhaps, in technical economic terms, inefficient. Moreover, it seems to me that these provisions are rather demeaning to attorneys who would handle this particular kind of case.

2. Senator Hollings' cross-examination of the panel on "peer review" exposed the difficulties with § 108 on expert scientific or medical opinion.

3. The subsequent remedial measures provision in § 109 seems to me inappropriate when applied to firms that have substantial market incentives to take remedial measures.

4. I instinctively question whether the product liability registry in § 110 is likely to be rigorously enforced. This provision manifests the difficulties of setting up laws that require new funding in time of budgetary stringency. The story on page A-17 of the Post for February 20th, 1986, on the infant formula law represents only one recent example of the sorts of problems that occur when legislation is not self-executing. To an extent I have the same apprehension about the resources that would be available to the national toxic health effects panel in § 213.

5. I have several questions and comments concerning Title II: What are the hoped-for effects of this section? Does it assume that most claimants have attorneys, or will enter the process "bare"? If one of the functions of products liability law—as I believe it is—is to fix the social costs of unreasonably dangerous products on those responsible for those costs, the combination of Titles II and III may present substantial disincentives of the bringing of actions by qualified attorneys.

6. Whether or not a claimant has an attorney—but especially if the claimant represents himself—the duty to disclose information in § 204 appears to make the "rights upon denial of liability" in § 208 rather meaningless.

7. You specifically asked me in the hearing to comment on the "risk-utility" provision of § 205. That provision appears to track some recent case law on strict liability. I simply wonder whether you wish to be more precise about how the provision relates to existing case law.

A separate point is that some element of a consumer expectation standard should be included in any such section.

8. The thirty percent (30%) figure in the toxic harm section in § 205, which is repeated later in § 213, strikes me as awfully high. I have very little education in statistics, but I would think that there is a rather large range of injury that is not covered by this figure that justice would suggest should be covered.

9. A fairly broad point: at least on my swift reading of the bill, only the reference to nuisance-law in the preemption section, § 103(d)(7), indicates how this bill would relate to the rest of tort law. Since that body of doctrine is rather complex, one potentially unfortunate effect of the bill as it stands would be to create significant confusion in the relation of the various branches of tort law.

10. Perhaps the most objectionable feature of the entire draft is the confinement of the basic standards of liability in § 302 to negligence. This is substantively unjust, it is objectionable in terms of the federal system because of its reversal of the almost unanimous judgment of the independent state judiciaries, and in the end it probably will generate a substantial new quota of litigation.

11. The basic policy choice that is made in § 303 simply seems to me to be the wrong one. It ignores the variety of distributional arrangements and opportunities to exercise economic power that are inherent in those various arrangements.

12. Is it clear that discovery of "the harm and its cause" in § 306 means that the claimant is barred if he or she is not on notice that the cause was a tortious one? If that is the intention of the provision, it seems to me unfortunate.

13. Unless I missed something, I do not understand how judicial norms will be set for the interpretation of this statute, nor how conflicts about its interpretation will be resolved.

14. A general observation: right now this is a bill that requires huge amounts of interpretation by the very courts whose judgment the existence of the bill calls into question. A major problem with legislation this complex is that it has so many vulnerable features that over a period of time, able litigating lawyers would seriously compromise any effectiveness it might have. For the same reasons, I do not think that you should underestimate the capacity of such a complex bill to produce even more burdens on the judicial system.

II. If I had to choose between the "S.1999" staff working draft and Gorton Amendment #3, dated February 24th, I would choose the latter. I would do this for at least two main reasons. First, the Gorton bill does not present the claimant with such an unfair set of choices concerning compensation tracks. Second, it retains the basic theories with which the courts are accustomed to work, and thus does not have the mischievous litigation-creating potential of the staff working draft. I do note a few concerns about this bill, several of which apply to the staff working draft as well:

1. I understand the concern of both staffs on the issue of accidents that cause physical damage only to the purchased property. However, I wonder what the answer is to the argument that hazards that cause that sort of harm are likely also

to pose serious risks to other property and indeed to human beings. I am not sure that the economic perception that is embodied in the barring of actions for damage to the property itself appropriately takes account of the sorts of risks that may be involved.

2. A point that applies to both drafts is that at least as a matter of economic theory, strict liability for blood may produce better blood in the long run. I realize that this not something that occurs to intuition, but it is an issue that should be considered.

3. Under § 202(d), is it realistic to believe that courts will be able to make this sort of judgment within 30 days? (I am not complaining about the idea, but rather asking about the probability of its effective execution.)

4. Are there standards for what the "appropriate amount of damages" would be?

5. What I have said with respect to § 109 of the staff working draft applies to § 209 of the Gorton draft on subsequent remedial measures.

6. § 210 of the Gorton draft is better with respect to non-manufacturer sellers than the staff working draft but still does not take account of the variety of economic realities in the distributional arrangements for products in this country.

7. I am not sure that I understand the thrust of § 214.

8. Based on my experience with this subject, both as a scholar and as an observer of efforts to prepare this kind of legislation, I do not think that a part-time "study group" will be able to do the job of oversight that would need doing.

9. The provision of appropriations "as may be necessary" seems to me vulnerable to the same objections as those which I have applied to the staff working draft.

III. I would like to reiterate that if Congress feels that is necessary to pass some kind of products liability legislation, it should confine itself to a law that is simple and aims to hit one or two principal targets. For example, the passage of a uniform statute of limitations and repose would probably aid significantly in dealing with cases involving machines that have been on the market for a long time; the manufacturers of these machines appear to be some of the most vociferous complainants, and perhaps with a substantial quotient of justice, about the present law. Moreover, such a statute would sweep in a lot of the problems that currently cause concern under such headings as state of the art, standard of liability, and remedial measures.

One of two highly specific provisions of this kind, combined with focused study of the sort that is proposed under § 111 and § 213 of the staff working draft, would aid in the long run solution of what is perceived as the producers liability problem.

IV. I now want to record some general reactions in response to the very interesting discussion in Panel I:

1. I am afraid that I did not make myself clear in responding to Senator Kasten's question about whether I was denying that there are a lot of manufacturers who are complaining about their products liability insurance. I do not in any way question what Senator Kasten's mailing brings him. What I do wonder is whether the judgments that are being recorded in products liability cases are unjust under the law or otherwise unfair to product sellers. I am sure that there are a few such cases, as there will be in any system of law. I seriously question, however, whether there is a substantial number of judgments of that sort that are arrived at by juries under the general oversight of trial judges, and finally of appellate judges.

With specific relation to this point, there is the further question—since liability insurance rates appear to be the heart of the perceived problem—of what is actually happening in insurance company setting of premiums. Many of the cases of "horribles" that I read in the newspapers seem to be center on firms that have had no record of liability-generating injuries but have found themselves being billed for extraordinary high premiums. It would be very interesting to know how insurers set these premiums and what the economic realities of this branch of insurance really are.

2. This leads me to reiterate a point picked up by both Senators Hollings and Kassebaum: it simply does not make sense to pass legislation of this sort without tying it to some very concrete data on insurer behavior and the impact of that behavior.

3. A very general and important point concerning the purpose of this branch of the law, whether it is common law or legislation: I flatly disagree with a premise that seems inherent in Professor O'Connell's approach to this subject, which is that tort law doesn't produce very much that is significant in the way of deterrence. I also strongly disagree with Mr. Huber's previous writing in which he argues that the tort systems isn't very good at dealing with "public risks."

We don't have tort law just to provide compensation to people. We have it because it joins compensation to rules that affect behavior. At the same time, tort law provides a social benefit that is at best only episodically provided by regulation. Regulation expands and contracts with politics. In this sense, tort law actually provides more stability than regulation and surely a lot more incentive to get at the facts about accident patterns. I repeat what I said about the investigation of the Challenger: it is taking a blue-ribbon commission of a dozen people and an extraordinary amount of investigation to turn up the same kind of evidence that products liability litigation has routinely produced over the years. Despite Mr. Huber's critical view of the Brodeur book, one might well ask where we would be on asbestos today if it were not for the asbestos litigation.

4. It is worth emphasizing that compensation for pain and suffering, which is the rule in every American jurisdiction so far as I know, is not a capricious introduction of the last 100 years. To the contrary, it goes back at least eight centuries to Maimonides. That is not to say that there aren't ways to put appropriate limits on those sorts of damages, but only vigorously to challenge the assertion that they are inappropiate.

Having criticized at length two drafts which I understand to have been primarily the product of staff, I would like to emphasize my respect for the dedication and seriousness of purpose that have characterized the work of staff members on this issue—in particular the persons with whom I have had principal contact over the last several months and even years: Zutensky, McGettigan, Bondurant. Particularly with reference to the staff working draft, I am critical not because of a lack of seriousness of purpose, but rather because I think that the general idea is an unwise one.

I would be very glad to discuss these matters with you, with staff, or in future hearings.

Sincerely yours,

MARSHALL S. SHAPO,
Voss Professor of Law.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION
OF THE UNITED STATES, INC.
Washington, DC, March 10, 1986.

Hon. LARRY PRESSLER,
U.S. Senate,
Washington, DC

DEAR SENATOR PRESSLER: The Motor Vehicle Manufacturers Association of the United States, Inc. (MVMA)[1] supports strongly your proposed amendment to S. 1999 regarding joint and several liability. As you know, under current law defendants who are found responsible for only 1 percent of an accident or injury can nevertheless be held liable for 100 percent of the verdict. In this day of multi-million dollar awards, the inequities are obvious. Indeed, MVMA members routinely face this potential in cases involving alcohol and other substance abuses.

For drafting purposes, we would suggest, however, that the term "negligence" be replaced by the term "responsibility" in lines 4 and 8 on page 1 and on line 1 on page 2.

MVMA, on behalf of its members, wishes to commend you for your interest in this crucial area of tort reform.

Very truly yours,

THOMAS H. HANNA.

AUTOMOTIVE PARTS & ACCESSORIES ASSOCIATION,
Lanham, MD, March 10, 1986.

Senator JOHN DANFORTH,
Chairman, Senate Commerce Committee,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Automotive Parts and Accessories Association submits the following comments on S. 1999, Product Liability Voluntary Claims and Uniform Standards Act, and asks that they be incorporated into the hearing record.

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[1] MVMA represents U.S. automobile, truck and bus manufacturers producing more than 98 percent of all domestic motor vehicles. MVMA members include: American Motors Corporation; AM General Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Mfg., Inc.; M.A.N. Truck & Bus Corporation; Navistar International Corporation; PACCAR Inc; Volkswagen of America, Inc.; and Volvo North America Corporation.

At the outset APAA would like to state its support for federal product liability reform and specifically S. 1999 as a means to solving the product liability dilemma.

APAA finds it reprehensible that the current tangle of state laws and court cases, which currently govern product liability law, has been allowed to continue. Such a system inhibits interstate commerce and prevents consumers, manufacturers and sellers of products from clearly understanding their rights and responsibilities under the law.

Mr. Chairman, our members are currently the victims of a product liability crisis which seems to know no bounds. Many parts manufacturers, some with little or no claims history, are having trouble obtaining insurance and even if they are successful, the price is so high that they question whether it is worth staying in business at all.

We think much of the cause of this crisis can be placed on an antiquated court system which punishes both the guilty and the innocent, causes confusion for all parties and ultimately penalizes consumers in higher product prices and legal fees. The prime culprits in this spider's web are the myriad of state laws and the courts' reliance on strict liability in determining responsibility.

The state by state and court by court inequities in the system mean that injured consumers' rights to sue vary by jurisdiction. Similarly, product manufacturers' responsibilities under the law are different in every state and court. The result is a system where product liability suits involving the same product and similar circumstances can have different outcomes depending on where they are heard. The cost of this confusion is built into product liability insurance premiums and into legal fees charged to both defendants and plaintiffs. And, of course, all of these costs ultimately are passed on to American consumers.

The system's inequities are exacerbated by a pronounced favoritism toward product users. Reacting to years of a caveat emptor mentality where the law made it difficult for consumers to sue product manufacturers for damages, the pendulum has now swung the other direction. The concept of strict liability, often the driving force behind the spike in claims and awards, now seemingly imposes on manufacturer the sole responsibility for injuries in which their products may be involved, with little if any regard for hosts of mitigating factors.

Working in tandem with strict liability is the "deep pocket" quest. Despite overwhelming evidence of improper use or negligence on the part of the user, the manufacturer often gets saddled with picking up the tab solely because the manufacturer's assets are judged greater than the injured party's.

Many trial lawyers contend that the present tort system is not at fault. Rather, they argue that it is a producer's responsibility either to make a product which anticipates and controls all conceivable dangers, or not produce at all. As far fetched as this may seem, the continuation of strict liability and the deep pocket theory are moving us in that direction.

The current system cuts at the very heart of America's free marketplace, where consumers vote with their dollars for the type and quality of goods they want produced. It is the confusion over product liability, not market forces, that can dictate production plans and skew prices to cover unknown costs and risks of product liability litigation and escalating premiums. The system also ignores the fact that products made in one state often are bought and sold in every state.

APAA feels that a uniform federal law that will remove confusion and allocate guilt and reparations more fairly is essential. We philosophically support S. 1999 as a step in that direction and find the concept of an expedited claims process promising.

We must temper that support, however, with the concern that any reduction in litigation brought on by the bill will be negated if manufacturers and sellers are vulnerable to a barrage of unnecessary and frivolous claims under the expedited system. APAA is concerned that, despite the commendable deterrent in section 208(e)(2, many consumers will file claims with a manufacturer with no clear basis, hoping that the manufacturer would rather settle than fight the allegation. The cost of processing and investigating each such claim could be prohibitive to many companies and especially crippling to small ones.

There should be a means for deterring unsubstantiated claims before they are filed. We are not yet sure how this can be accomplished, but we offer to work with the committee to explore such a mechanism.

APAA is generally pleased with Title III of S. 1999 on civil suits. However, we are concerned that section 302 does not specifically take into account the negligent actions of the claimant. Many components of a car, for example, are modified by the car owner in ways which are not intended and cannot be anticipated by the manufacturer. Although section 302 limits consideration by the court to whether the manufacturer acted negligently in producing or designing the product, APAA urges the committee to consider adding a provision which would directly exclude manufacturers from paying damages due to unexpected or forewarned misuse by the claimant.

APAA fully supports the section 302 provision that allows compliance with government standards as a rebuttable defense against civil suits. It is certain to help juries to decide whether a product was designed properly, an often difficult task because of the technical nature of some products. The provision also has the added advantage of encouraging compliance with federal safety standards.

APAA strongly suggests that the section 306 statute of repose provision be extended to cover consumer goods including automobiles and components. Many state product liability laws contain a statute of repose for consumer goods; however, they vary in length from state to state. Failure to set a uniform standard will deny insurance companies the predictability of exposure they need to set reasonable rates.

APAA would support a statute of repose provision similar to Senator Gorton's proposal establishing a time limitation equivalent to the useful life of the product or 12 years. The average life of a car on the road is 6.8 years and most auto parts defects appear in the first two years. Indeed, the Interagency Task Force on Product Liability concluded that most defects in consumer goods appear within the first 10 years, which is the acknowledged useful life of a car. Therefore, we see Senator Gorton's proposal as very fair.

Finally, many in Congress claim that the biggest threat to U.S. industry is unfair foreign trade practices. While we agree that this is a big problem, we also know that another enemy lurks much closer to home. All our efforts to open foreign markets will be of no avail if American businesses are forced into bankruptcy or oblivion by our court system. Unlike foreign trade ills, however, the answers to the product liability dilemma are within our grasp.

APAA supports S. 1999 and your continuing efforts to develop compromise product liability reform.

Our members send another message. The situation is desperate and getting worse. The time to act is now.

Thank you for your attention. Please contact me if you have any questions or if APAA can be of any further assistance.

Sincerely,

JULIAN C. MORRIS, *President.*

CRUM & FORSTER INSURANCE COMPANIES,
Washington, DC, March 10, 1986.

Hon. LARRY PRESSLER,
U.S. Senate,
Washington, DC.

DEAR SENATOR PRESSLER: Your staff was kind enough to give me a copy of an amendment you plan to offer to Title III of S. 1999, the product liability reform legislation currently pending before your Committee on Commerce, Science and Transportation. The amendment would establish a uniform rule of several, as opposed to joint, liability in all product liability actions.

The companies I represent, which together are the Nation's twelfth-largest group of property-casualty insurers and its second-ranked writers of general liability insurance, offer their unqualified support for your proposed amendment and urge that you offer a similar amendment to Title II of S. 1999.

Your amendment would remove the single most serious common law impediment to the underwriting and pricing of product liability insurance—the rule, found in 36 States' laws, that even tortfeasors who can demonstrate a proportional contribution to the cause of a plaintiff's harm may be required to pay all of the ensuing damages.

This rule, although referred to as a "joint and several liability," is in fact a perversion of true joint and several liability, which applies only when two or more defendants engaged in the same harmful activity cannot distinguish their several (or proportionate) contributions to the cause of a plaintiff's harm.

As a prominent legal scholar has noted, "The terms 'joint tort' and 'joint tortfeasors' have been surrounded by no little uncertainty and confusion. . . . An examination of the multitude of cases in which they are to be found leads to the conclusion that they have meant very different things to different courts, and often to the same courts, and that much of the existing confusion is due to a failure to distinguish the different senses in which the terms are used, which often has had an unfortunate effect upon the substance of the law." [1]

Your amendment would end this uncertainty and confusion in product liability actions, and would apply the general rule that "where the independent concurring acts have caused distinct and separate injuries to the plaintiff, or where some reasonable means of apportioning the damages is evident, the courts generally will not hold the tort-feasor jointly and severally liable." [2]

The original meaning of a "joint tort" was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result. In such a case, there was a joint enterprise, so that "all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present." [3]

As Professor Prosser has observed:

> . . . The rule goes back to the early days when the action of trespass was primarily a criminal action; and it has survived also in the criminal law. This principle, somewhat extended beyond its original scope, is still law. All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.[4]

The courts have long recognized that where "(t)he lack of concert, collusion, common design, or any other element of connection among the defendants is clearly revealed by the evidence," [5] joint liability may not be imposed:

> . . . This exception or limitation is that there is no joint liability nor liability for entire damages when the tort-feasors act independently; without concert, collusion, or common design, and the injury to the plaintiff is consequential only, or remotely resulting, as contradistinguished from direct and immediate.[6]

Notwithstanding this clear and easily understood exception to joint liability, courts across the country are ignoring it in their relentless search for the "deep pocket" defendant. Considerations of fairness and proportion in the treatment of defendants are increasingly given secondary treatment, and "tort" law is becoming nothing more than a judicially-created and judicially-enforced mechanism for the redistribution of wealth. The basis on which liability will be imposed is approaching what Professor Prosser calls an "absolute wrong":

> . . . As between an entirely innocent plaintiff and a defendant who admittedly has departed from the social standard of conduct, if only toward one individual, who should bear the loss? If the result is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's entire innocence. If it is unjust to the defendant to make him bear a loss which he could not have foreseen, it is no less unjust to the plaintiff to make him bear a loss which he too could not have foreseen, and which is not even due to his own negligence. . . .
>
> The real problem, and the one to which attention should be directed, would seem to be one of social policy: whether the defendants in such cases should bear it the heavy negligence losses of a complex civilization, rather than the individual plaintiff. Because these defendants are in large measure public utilities, governmental bodies, industries, automobile drivers, and others who by rates, prices, taxes or insurance are better able to distribute the loss to the general public, many courts may reasonably consider that the burden should rest upon them. . .[7]

The redistributionist philosophy underlying assignments of disproportionate liability to defendants with only tangential and easily distinguished responsibility for particular harms poses insuperable problems for liability insurers: it is simply not possible to calculate and price the exposure to loss of any enterprise whose liability may be based not only on the risk its own conduct creates, but also on the risk that the conduct of an unknown universe of others may create.

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[1] 43 W. Prosser, "Handbook of the Law of Torts" (3rd ed. 1964) (citations omitted).

[2] 1 Harper & James, "Torts," § 10.1, at 694.

[3] *Sir John Heydon's Case*, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613).

[4] 43 W. Prosser, "Handbook of the Law of Torts" (3rd ed. 1964) (citations omitted).

[5] *Farley* v. *Crystal Coal & Coke Co.*, 85 W. Va. 595, 9 A.L.R. 933, 102 S.E. 265 (1920).

[6] *Ibid.*

[7] 50 W. Prosser, "Handbook of the Law of Torts" (3rd ed. 1964) (citations omitted).

You heard testimony on February 27 from an executive of the product liability insuer of a company found liable for making a motocycle seat covering that was "too slippery," allowing a passenger wearing a studded belt buckle to slide forward into the driver, who was forced to brake for a car 3that had run a stop sign. The stud on the belt buckle severed the driver's spinal cord in the accident, whose cause was totally unrelated to the conduct of the seat fabric manufacturer; yet the manufacturer was held liable for the overwhelming majority of the plaintiff's damages.

This case, and others like it in different contexts (e.g., municipal liability), illustrate the extent to which "joint and several liability" has been perverted by the Nation's courts to fund awards to innocent parties at the expense of other innocent parties or clearly *de minimis* contributors to the harm at issue. How are insurers to price uncontrolled vicarious liability?

The compensation of injured persons has a justifiably high priority in a caring society, but so does a sense of fairness and equity. These concepts need not be mutually exclusive, but the courts seem to be achieving the former at the expense of the latter, and in manner which threatens the insurability of any entity subject to what is erroneously called "joint and several liability."

Your amendment would not, as we understand it, leave deserving plaintiffs uncompensated in cases of true joint and several liability, those in which, because of the identity of the conduct of the defendants and the impossibility of proving their proportional contributions to the cause of the plaintiff's harm, the comparative negligence of the parties is not an issue.[8]

Rather, we understand your amendment to apply to those cases in which the conduct of the defendants is distinguishable and their separate contributions to the cause of the plaintiff's harm are identifiable.[9]

We feel confident that the great majority of cases in which what is loosely called "joint and several liability" is applied fall into the latter category, and, therefore, that your amendment to Title III of S. 1999 would substantially improve the predictability of risk among product manufacturers and the insurability of product liability.

We also urge you to consider offering the identical amendment to Title II of S. 1999, so as to assure the equitable apportionment of losses in the proposed Expedited Product Liabilty Claims Procedures as well as in traditional product liability actions. Surely, the truth underlying your amendment is meritorious in any context. As the Supreme Court of Kansas said, in upholding a statute virtually identical to your proposed amendment:

> There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.[10]

We look forward to working with you to assure the incorporation of your amendment into any product liability legislation reported from your Committee on Commerce, Science, and Transportation.

Best wishes.

Sincerely yours,

LESLIE CHEEK, III,
Vice President-Federal Affairs.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK,
Brooklyn, NY, March 10, 1986.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science, and Transportation,
Washington, DC.

MY DEAR SENATOR DANFORTH: Thank you for sending me a copy of S. 1999 providing for uniform product liability and other purposes. The draft is most impressive.

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[8] See, e.g., *Moore* v. *Foster,* 182 Miss 15, 180 So. 73 (1938); *Oliver* v. *Miles,* 144 Miss. 852, 110 SO. 666, 50 A.L.R. 357 (1962); *Summers* v. *Tice,* 33 Cal. 2d 80, 199 P. 2d 1, 5 A.L.R. 2d 91 (1948); *Maddux* v. *Donaldson,* 362 Mich. 425, 108 N.W. 2d 33 (1961).

[9] See, e.g. *Farley* v. *Crystal Coal & Coke Co.,* 85 W. Va. 595, 9 A.L.R. 933, 102 S.E. 265 (1920); MITCHELL REALTY Co. v. *City of West Allis,* 184 Wis. 352, 199 N.W. 390, 35 A.L.R. 396 (1924); *Conellan* v. *Coffey,* 122 Conn. 136, 187 A. 901 (1936).

[10] *Brown* v. *Keill,* 224 Kan. 195, 580 P. 2d 867 (1978).

I should have liked to accept your invitation to appear at the public hearings, but my court calendar precludes the pleasure of discussing the matter with you orally. I hope, therefore, that this letter—brief as it is—will suffice for the moment. Should you wish further elucidation, I should be pleased to hear from you.

Certainly, some of the developments in this area may threaten the viability of the United States as a single integrated commercial entity. It is, therefore, appropriate under the Commerce Clause to protect our great common market by considering national legislation. The interests of the States must give way to the overriding importance of the national economy. Given production and use on a national scale, there are some areas where the States will have to forego their traditional control over tort law in all its aspects, including procedure.

The approaches in S. 1999 are very useful. The reduction of the burden of proof to 30% with limited damages is sound in the area of toxic chemicals and fields where there may be a variety of producers and it is not clear which particular injured person was affected by particular producers. The issue is discussed at some length in one of my opinions in the Agent Orange case, 597 F. Supp. 740, 816–43 (E.D.N.Y. 1984).

The National Toxic Health Effects Panel is an interesting approach. There seems to me to be some doubt whether its decisions should be made binding without an opportunity for a hearing for those injured and those claimed to have been responsible.

If this Panel is used as a kind of scientific expert to experiment and conduct discovery in critical areas it could make a very useful contribution to the field. The expenses of such experimentation and research are very great. As you know, in the case of Agent Orange it was estimated that up to $150 million will be expended in the course of scientific inquiry. Very often, too, the injury will not be apparent for many years and the scientific information will not be fully developed and available. This was apparently the case, at least in part, in connection with asbestos. Unless the Congress would be willing to appropriate substantial funds for this Panel, it could not operate effectively.

Some of the Panel's studies will be duplicative of those conducted by other agencies charged with product safety. The ability of the Panel to call on other agencies such as the Food and Drug Administration, the Occupational Safety and Health Administration and the Centers for Disease Control should, I believe, be embodied in the bill.

I have some doubts about the need for a special miniature code of evidence. For example, Sec. 108, requiring "support in peer-reviewed scientific or medical studies," in effect reintroduces the Frye doctrine. I have some doubt about that doctrine as indicated in the full discussion in my treatise on evidence at ¶ 702[03]. The material on subsequent remedial measures in Sec. 109 is, I believe, covered sufficiently by the current rule, Rule 407 of the Federal Rules of Evidence, also discussed in my treatise.

The provision in Sec. 202(e) on attorney's fees is not in itself objectionable. However, if fees are allowed on a contingent basis, then should there not be a provision for a multiplier? This is in accordance with standard lodestar analysis. I myself have some doubts about incorporating the lodestar method. See my opinion on the Agent Orange attorney fees, 611 F.Supp. 1296, 1306 (E.D.N.Y. 1985), as well as the Third Circuit Task Force's report entitled "Court Awarded Attorney Fees," dated October 8, 1985.

I have some doubts about Sec. 203(d). Under this provision a disproportionate number of claims against one manufacturer with a deep pocket would be possible even though the manufacturer was responsible for only a small portion of the total product produced.

There are, understandably, other problems implicated in connection with a bill as important and pathbreaking as this one. Were I to have the benefit of your hearings, my own views would undoubtedly be modified.

I have discussed some of the issues in an article that will be published this spring in the Columbia Journal of Environmental Law. I am enclosing a copy of the page proofs with permission to use them if you wish. Corrected poage proofs can be furnished.

With all best wishes,
Very respectfully,

JACK B. WEINSTEIN,
Chief Judge.

WHIRLPOOL CORP.,
Benton Harbor, MI, March 13, 1986.

Hon. JOHN C. DANFORTH,
497 Russell Senate Office Building,
Washington, DC 20510

DEAR SENATOR DANFORTH: Whirlpool Corporation, a leading manufacturer and marketer of major home appliances, fully supports the concept of a uniform federal product liability law. We have over the years submitted comments on the issue and commend your efforts in this area. We wish now to offer, for the record, a few of our thoughts on S. 1999, the second working draft.

In addition to supporting the concept, we have in the past supported a limitation on the filing of claims or lawsuits based on the age of a product following the date of manufacturers or the date of purchase by the initial user. We again recommend, that for major home appliances, the statute of response be specified at not more than 10 to 12 years rather than 25 years as stated in Title III, Section 306(b).

While S. 1999 includes some very constructive attempts to solve the complex issue of federal tort reform, Whirlpool cannot support its enactment in its entirety. We are specifically concerned with certain provisions of Title II: The Expedited Product Liability Claims Procedure.

We perceive in Section 203 of Title II a lack of clarity as to what is necessary to establish proof of claim. Further, what may be inferred is that the manufacturer is considered guilty until he proves himself innocent. Under these circumstances, alternate dispute resolution will never take place. Consumers and manufacturers will opt to or be forced to litigation under Title III to establish proof of the claim.

Whirlpool Corporation believes that both parties to a claim must work to establish proof; the claimant informing the defendant and the defendant informing the claimant of the information necessary for proof of liability. Both sides must take an active role in resolution and have incentives to resolve the claim short of litigation. Under these circumstances, the 90 days (Section 203(c)) given to manufacturers to respond completely to a claim is seriously deficient.

In our experience, claims fitting the alternative resolution provisions of Title II are of two types—the first are minor claims by individuals which are efficiently handled by our company's internal system, hence a claimant has no need for the Title II provisions. The second type is claims in which the claimant is an insurance company. This kind of claim involves subrogation rights and can rarely be resolved short of litigation due to the unwillingness of the insurance company representatives to present evidence of causation in the claim stages.

It would be more desirable to enact a uniform set of laws under which consumers and manufacturers can operate with a high degree of certainty as to the outcome of litigation. No claim procedure will be more effective in resolving claims than a fair, uniform law governing civil actions which clearly sets forth the rights of the consumer in unambiguous terms.

While we hope you will consider the above comments before finalizing your bill, let us assure, again, that we endorse your overall efforts toward a uniform product liability law. Please feel free to contact me if you desire further information (616/926-3219).

Sincerely,

A.J. TAKACS, *Vice President.*

FLEXIBLE PACKAGING ASSOCIATION,
Washington, DC, March 14, 1986.

DAVID ZORENSKY, Esquire,
Senior Counsel, Consumer Subcommittee, Senate Committee on Commerce, Science and Transportation, Washington, DC.

DEAR MR. ZORENSKY: This letter contains the views of the Flexible Packaging Association (FPA) on S. 1999, "The Product Liability Voluntary Claims and Uniform Standards Act. We ask that it be included in the record of hearings on the bill.

FPA is the national trade association of companies that manufacture flexible packaging and materials used to produce such packaging. Flexible packaging, as the name implies, is pliable or non-rigid packaging constructed of plastic film, aluminum foil, paper or a combination of such materials. Polyethelene bread bags are but one example of the thousands of different kinds of flexible packages that contain food, drugs and many other products. Annual sales of flexible packaging exceed $5 billion, and over 75% of this amount represents sales by FPA members.

FPA's members, like many other manufacturers and product sellers, have become increasingly concerned over expanding product liability exposure, skyrocketing insurance costs, and the plethora of state laws on product liability. Manufacturers and product sellers involved in interstate commerce face intolerable uncertainty over potential exposure to claims for injury or damages resulting from the use of their products as a result of the lack of uniformity of state product liability laws.

Historically, the states applied traditional common law principles so that standards for liability did not differ significantly between the various jurisdictions. Because of this uniformity, manufacturers and product sellers could engage in interstate commercial activities confident that they understood the legal standards for safety and care to which they would be held. Furthermore, potential liability for injury to a user had to be predicated generally on some degree of fault by the manufacturer which would have to be demonstrated to have proximately caused the injury.

During the past quarter century, however, adherence by the various states to these traditional principles has steadily erroded. States have engaged in testing newer and ever expanding concepts for imposing liability on manufacturers and product sellers. Concepts of fault and causation, the pillars of traditional tort law, have been seriously weakened, or done away with altogether. At the same time, common law defenses which would have precluded injured parties harmed by their own negligent actions from recovering damages have been modified or abrogated.

This radical break with traditional concepts requiring fault and causation has resulted in a patchwork of ever changing standards which no responsible manufacturer can hope to satisfy. Manufacturers and product sellers are at risk to defend their products and corporate decisions under standards of conduct that were not in existence at the time those decisions were made.

The lack of uniformity in product liability law has meant that manufacturers can never be certain, even if they have used all due care in manufacturing a product, that they will not face liability for injuries involved any time the product is used, even when that product is misused or altered. The situation is grossly unfair, resulting in increased costs for manufacturers and consumers alike.

For these reasons, FPA supports the concept of a federal product liability statute to reduce uncertainty and ensure uniformity in this field of law. Adoption of a federal standard which preempts state law will assist manufacturers and product sellers in their business planning, will discourage unmeritorious suits at the outset, and will prevent "forum-shopping." While as a general rule FPA favors limited federal intervention, the product liability area is one in which reform efforts at the state level have failed, and federal standards appear to be the only remaining alternative.

We, therefore, commend Senator Danforth for his efforts to address this lack of uniformity and fairness by introducing S. 1999. In this letter we shall limit our comments to some of the more important changes we believe should be made in the bill.

Section 108 of S. 1999, which deals with expert opinions, would allow an "expert" to testify if there were some support for the position in peer-reviewed scientific or medical studies. FPA strongly urges including language that would require an expert's opinion to have substantial support among eminent professionals in the particular discipline before it can be admitted into evidence. If fairness is to be restored to the product liability system, then the expert's opinion should be substantially supported by the recognized leaders in that field.

Section 205 of the bill states that a manufacturer is liable under the circumstances set forth in that section "unless the claimant acted in some material respect in a manner which was a *gross* failure to exercise reasonable care." (Emphasis added.) This gross negligence standard places too high a burden of proof on the manufacturers and too low a standard of conduct on the claimant. We suggest that the claimant should be denied recovery if the claimant's negligence was the predominant cause of the injury.

Section 205(b) now imposes a risk-utility trigger for Title II liability. This places a burden on the manufacturer to show that the utility of the product outweighed its risks, if known. A less complicated test should be required, since the procedure in Title II was developed to handle expedited claims. Risk-utility will require an economic analysis of the benefits and feasibility of the product. This trigger, since it will require proof of benefit, will inject into this expedited procedure the very uncertainties that plague industry and claimants in traditional litigation.

Title III provides that a manufacturer is liable for harms caused by its negligence except for the strict liability for manufacturing deviations. We believe it should include language clarifying that warnings are not required for dangers which are open and obvious, or for product misuse and alteration.

Finally, FPA continues to oppose in principle the continued availability of punitive damages. We believe, however, that if punitive damages are allowed, then a maximum ceiling for such damages should be established. Furthermore, any punitive damages awarded should be excluded from the formula under which an attorney's fee is ultimately based. The theoretical purpose of punitive damages is to punish a deliberate and reckless wrongdoer, not to reward the attorney who brings the action.

In conclusion, we note that two closely related bills, S. 2038 and S. 2046, recently have been introduced and referred to the Committee on the Judiciary. Although not the subject of the current hearings on S. 1999 by the Commerce Subcommittee, those bills address several of the most important problems affecting our tort law system. We, therefore, urge that they be given careful consideration by the members of the Committee on Commerce, Science and Transportation in their deliberations on product liability reform.

Respectfully submitted,

GLENN E. BRASWELL, *President.*

KEITH L. DAVIDSON,
Chicago, IL, March 17, 1986.

Hon. ROBERT KASTEN,
U.S. Senator,
Washington, DC.

DEAR SENATOR KASTEN: Enclosed herewith are my comments on S. 1999, "A Bill to Regulate Interstate Commerce by Providing a Uniform Product Liability Law, and for Other Purposes."

These comments represent only my own views and are provided in response to the request Senator Danforth made when I appeared with Professor Marshall Shapo, on behalf of the American Bar Association, to convey the ABA's opposition to the Bill in concept and in purpose.

Because the ABA opposes any broadly based federal legislation in the product liability field, the ABA has taken no specific position as to S. 1999 or any other bill designed to implement the concept and purposes of S. 1999. Therefore, the views in this letter do not necessarily reflect the views of the American Bar Association.

Notwithstanding the ABA's opposition to broad federal legislation in the product liability field, a position with which I personally agree, I have tried to provide comments in the spirit in which they were requested by the Committee, focusing primarily on structural and drafting details of the Bill and refraining from argument about the philosophy of the Bill except insofar as the philosophy seems germane to its structure and drafting.

I sincerely hope these comments will be of assistance to you and to the other Members of the Committee on Commerce, Science, and Transportation.

Respectfully yours,

KEITH L. DAVIDSON.

P.S. Marshall Shapo has provided me a copy of his letter of March 5, 1986, commenting on Senator Danforth's Bill and Senator Gorton's Bill. I am in general agreement with Professor Shapo's comments.

Enclosure.[1]

HEMCO INDUSTRIES, INC.,
Houston, TX, March 18, 1986.

Senator JOHN C. DANFORTH,
497 Russell Building,
Washington, DC.

DEAR SENATOR DANFORTH: The filing of unwarranted product liability suits against people who make things has come to very serious proportions and something must be done about it by the U.S. Congress. It is so serious that if something isn't done about it, our creativity and individual initiative in this country will be further stifled. Companies will be reluctant to put out a new product unless they can get liability; and, if the product is such that they can, the cost of the liability will be so high that the price of the product will be so high that it cannot be marketed at a profit.

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[1] The enclosure is in the Committee files.

Although I am reluctant to recommend putting ceilings on damages, I think it should be done if nothing else can be found to prevent these frivilous and unwarranted suits (some of them absolutely border on the ridiculous). First, however, I think we should explore the avenue of making it mandatory that gross negligence be proved before any damages can be awarded. Also allow a manufacturer to enter into evidence in the suit any contributory neglect by either the user or anyone who has been connected with the product and make it mandatory that it be considered by the jury.

The American people have been led to believe that insurance money is somehow created from thin air and does not cost anybody anything. The jurors in this country are no exception to this; hence, the big awards. However, if legislation can be passed to where the instructions to the jury specifically state that someone has to be proved grossly negligent before damages can be awarded, I think many of the frivilous law suits will stop before they begin.

Please enter this letter as testimony in any committee discussions concerning this matter.

Yours very truly,

R.M. Bevis, *President.*

American Dental Association,
Washington, DC, March 24, 1986.

Hon. John C. Danforth,
Chairman, Committee on Commerce, Science and Transportation, 497 Senate Russell Office Building, Washington, DC.

Dear Chairman Danforth: The American Dental Association appreciates this opportunity to present its views on recent committee hearings on costs and availability of liability insurance as well as the need for liability reform, such as embodied in S. 1999.

In the Association's view, the present liability situation has reached such dimensions that it is no longer just a product liability problem or a professional liability crisis. It is pervasive, burgeoning problem that is affecting all segments of our society—state and local governments; small businesses; health care professionals including dentists; day care centers; dental product manufacturers; bus drivers; bartenders; and even members of the clergy. Ultimately, however, it is the public who consumes such products and services, that has to pay the price of higher liability costs in the form of direct insurance premium costs and indirect costs of defensive practices.

At the same time, the dental professional recognizes the need for a fair and efficient system to resolve claims for injuries that do occur as a result of negligent conduct. However, our concern is that the present litigation system is not working fairly or efficiently due to excessive filing of claims, laborious litigation, duplicative awards, and therefore is causing sharply higher liability premiums for dentists and others seeking coverage.

This dramatic escalation of dental liability insurance premiums is projected to continue—resulting in percentage increases that are staggering. Last year dental liability premiums went up 300 percent on the average, and this year premiums are expected to double. If no action is taken, it is expected that liability premiums will at least double every four or five years. Dentists, who utilize anesthesia outside the hospital, are expected to be paying as much as $60,000 and even more in liability insurance premiums in some areas such as New York City.

Additionally, dentists, probably more so then most other health care practitioners, expend substantial amounts on dental equipment and products for their practice, e.g. the cost of a dental chair and unit alone can be as much as $10,000. Liability insurance costs associated with products and equipment naturally become another liability cost that contributes to the costs of dental care services.

Mr. Chairman, the present litigation system is in need of major reform. The Association strongly supports such reform, but we recognize that the most appropriate forum for such reform is at the state level. We also believe, however, that the federal government does have a role in using financial incentives or sanctions to encourage the states to act.

In undertaking any federal action, the Association would recommend that sufficient flexibility be maintained for the states either in the form of federal guidelines or a list of tort reforms to be adopted. Any federally mandated list of state tort reforms should be modified and broadened to apply to all liability situations, including product liability cases.

Such a list of tort reforms should also contain optional choices for the states as well as specifically mandated reforms that are most effective in saving costs and promoting equity—namely, elimination of the collateral source rule and a cap or limit on non-economic damages set at a reasonable limit. A secondary list of optional tort reforms could include reforms such as shorter statutues of limitation, structured payments, reasonable limits on contingency fees, joint and several liability reform, and curtailing the use of strict liability. States would have to select at least two of the optional reforms. Such flexibility would allow the states some input into reforming their own tort laws.

Instead of promoting an alternative liability system as contained in S. 1999, the Association would prefer another approach. While the Association has been intrigued with the Moore-Gephardt alternative liability proposal for the past two Congresses, we have yet to see it work in practice other than in a way that is already available in out of court settlements. We also have had concerns about whether or not such a concept would overburden further a resolution system that is already flooded with claims, many of a frivolous nature.

The Association would recommend an alternative liability mechanism based on an arbitration process and panels of qualified experts. If a claimant received an adverse decision by the panel, he could still litigate the case in court. However, if the plaintiff did not prevail in court, he would have to pay defense as well as litigation costs. Some version of the abritration or pre-trial screening panels has already been adopted in about 30 states. The main problem in implementation has been in balancing their mandatory nature with sufficient flexibility to protect the constitutional rights to due process. However, we would point out that if such arbitration panels are established properly, such should address any possible concerns.

Mr. Chairman, undoubtedly the insurance industry also bears its share of the responsibility for the present liability crisis. We hope the committee will carefully review insurers' practices in such areas as projecting premiums, use of experience rating, implementation of a risk management requirement as a condition of liability coverage, and making determinations to settle rather than litigation claims.

We would also recommend various classes of insurance rates be based on a health care professional's record on malpractice judgments and arbitration awards, and on participation in ongoing risk management programs. For health care professionals with multiple judgments against them, there would be escalating increases in insurance rates. If such incidents continued to occur, this information could be forwarded to the state licensing board to investigate whether or not to reprimand, suspend, or revoke the license of the health care practitioner in question. On the other hand, if practitioners maintained a good record and attended risk management programs on a periodic basis, then they could receive premium credits.

Mr. Chairman, we all realize that more can be done by state disciplinary boards, peer review committees, and risk management programs to insure quality of care and to prevent or at least minimize incidences of negligent practice.

The Association recently revitalized a comprehensive risk management program. Such programs should be helpful not only in raising the awareness of dentists to liability problems and their prevention, but also will result in the continuing high quality dental care services rendered to the public.

The Association also has effectively utilized peer review committees in maintaining the quality of dental care. We would suggest that recently peer review efforts have been impeded by liability problems confronting members of the profession who agree to serve on such committees. We would strongly endorse federal legislation, similar to H.R. 4390, that would grant limited immunity for such persons.

Mr. Chairman, we pledge to do our best in educating dentists and the public about the liability problem and a range of possible solutions. However, this will simply not be enough in light of the magnitude of the liability crisis. The liability problem has reached such dimensions that it will require the efforts of all interested parties to reform a litigation system that is ineffective and inequitable.

We urge members of this committee to explore the common liability reforms of the numerous legislative proposals on product liability, professional liability, and general liability reform. The Association appreciates the opportunity to present its views, and we look forward to working with you and your staff in promoting workable liability reform.

Sincerely,

ARBRAHAM KOBREN, M.S., D.D.S.,
President.

National Printing Equipment and
Supply Association, Inc.,
March 25, 1986.

Hon. Robert W. Kasten, Jr.,
Chairman, Subcommittee on Consumer, Committee on Commerce, Science and Transportation, Room 227 Senate Hart Office Building, Washington, DC.

Dear Senator Kasten: On behalf of the U.S. printing equipment and supplies industry which NPES represents, we again express our appreciation for the opportunity to testify before your Consumer Subcommittee on March 11, 1986 on Section 104 of S. 1999, the Records Retention provision.

As we noted at that time, our industry is dominated by small businesses, most of which have annual sales of less than $5 million. These small entrepreneurs, already overburdened by thousands of statutes and regulations, can ill-afford more onerously time consuming and costly requirements such as those contained in Section 104 of S. 1999.

Enclosed with this letter is a copy of a legal memorandum prepared by The Product Liability Alliance (TPLA), to which we referred during our March 11 testimony, and said we would send to you. It provides a detailed analysis of existing regulatory requirements and spoliation of document sanctions, and helps to illustrate why we believe Section 104 is unnecessary.

We would also like to take this opportunity to respond more directly to several of the points made by Ms. Lipsen of Consumers Union in her testimony on March 11, and arguments offered by Ms. Lipsen and other consumer representatives in a joint written statement of February 27, 1986 filed with the Subcommittee, concerning the record retention requirements of Section 104.

Retention of Records v. Destruction of Evidence

A fundamental point of misstatement and misimpression contained in the consumer group's comments on Section 104, is their constant confusion of business records and documents on the one hand, and evidence, or potential evidence in a law suit on the other.

The key issue here, of course, is the critical difference made once a law suit is filed. Although disposal of records prior to a claim being filed may later raise an adverse, but rebuttable, inference, destruction of records that could likely be needed as evidence once a suit is pending is clearly inappropriate and violative of a parties duty not to thwart the proceedings of a court.

An adverse but rebuttable evidentary inference may be drawn concerning the strength of a party's case if the party deliberately destroyed evidence to prevent its use in litigation. However, the adverse inference arises only if the destructive act was accompanied by intentional conduct indicating fraud and a desire to suppress the truth. The inference may be rebutted upon a showing of the absence of evil intent or bad faith. And as one commentator has stated, "the adverse inference is strongest when document are selectively destroyed, since by its nature ad hoc destruction suggests corrupt intent."

However, a company that adheres to an established records management program is in a much stronger position to prove that destruction of records was part of its ordinary course of business. If one starts from the premise that it is simply too costly for companies to retain every report, record, and document indefinitely, then a regular disposal program is a way of protecting a company from the drawing of an adverse inference should litigation ensue—not a systematic attempt by business to hide potential liability-producting records.

Lawyer-Client Privilege

Consumers state the fear that even with the onerous provisions of Section 104, manufacturers would still take advantage of the lawyer-client privilege to avoid or delay disclosing information. Arguments such as these appear to demonstrate either ignorance or lack of understanding of the underlying rationale of the lawyer-client privilege and its parameters.

The privilege for communications of a client with his lawyer hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice. The application of the privilege to writings presents a situation which requires discriminating analysis. One commentator McCormick on evidence puts it this way:

> These written privileged communications are steadily to be distinguished from pre-existing documents or writings, such as deeds, wills, and warehouse receipts, not in themselves constituting communications between client and lawyer. As to these pre-existing documents two notions come into play. First, the client may make com-

munications and the knowledge of the terms and appearance of the documents which the lawyer gains thereby are privileged from disclosure by testimony in court. Second, on a different footing entirely stands the question, shall a lawyer who has been entrusted with the possession of a document by his client be subject to an order of court requiring him to produce the document at the trial or in pretrial discovery proceedings whether for inspection or for use in evidence? The policy of encouraging full disclosure does of course apply to encouraging the client to apprise his lawyer of the terms of all relevant documents, and the disclosure itself and the lawyers knowledge gained thereby as we have seen is privileged. It is true also that placing the documents in the lawyer's hands is the most convenient means of disclosure. But the next step, that of adding to the privilege for communications a privilege against production of the pre-existing documents themselves, when they would be subject to production if still in the possession of the client, would be an intolerable obstruction to justice. To prevent the court's gaining access to a relevant document a party would only have to send it to his lawyer. *So here the principle is controlling: if a document would be subject to an order for production if it were in the hands of the client it will be equally subject to such an order if it is in the hands of his attorney.*

Additional Comments on S. 1999

Finally, in addition to our views on Section 104 stated in our testimony and in this letter, our association has formulated preliminary positions on several other aspects of S. 1999.

Following our own review, and with the benefit of the testimony of other witnesses before the Subcommittee we have reached the conclusion that Title II as currently drafted has two major problems: (1) uncertainty as to the number of claims resulting from the triggering event language in Section 205 of the bill; and (2) the complicated nature of the procedures set forth for pursuing a claim under Title II.

We have, therefore, reached the tentative conclusion that a system of economic incentives in Title II would be preferable to the trigger mechanism currently employed. Although this is not an official NPES position yet, we are actively studying concepts that could make such a system function. However, in conjunction with this approach we would expect that Title III continue to be a much tougher negligence-based system.

Once again, thank you for the opportunity to appear before your Subcommittee. We look forward to continuing to work with your staff in resolving this issue of critical importance for product manufacturers.

Sincerely,

MARK J. NUZZACO,
Government Affairs Director.

Enclosure.[1]

NATIONAL RETAIL MERCHANTS ASSOCIATIONS,
Washington, DC, March 25, 1986.

Hon. JOHN C. DANFORTH,
Chairman, Commerce, Science and Transportation Committee, Room 497, Russell Senate Office Building, Washington, DC.

DEAR SENATOR DANFORTH: I am writing on behalf of the National Retail Merchants Association ("NRMA") to provide testimony on S. 1999, the Product Liability Voluntary Claims and Uniform Standards Act. The Consumer Subcommittee held hearings on February 27 and March 11, 1986. We request that this letter be included as part of the official record of those hearings.

The NRMA is the nation's largest trade association for the general merchandise retail industry. Our members operate 45,000 leading department, chain, independent and specialty stores in all 50 states. Annual sales exceed $150 billion in consumer products. As retailers, the relationship between us and our customers is direct, very close and important. Accordingly, fundamental revision to the product liability law is of significance to NRMA and its members.

Overview

The current fragmented product liability system must be changed. It encourages forum shopping, vastly disparate treatment of comparable claims, excessive damage awards in some instances, and needlessly blocked recoveries in others.

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[1] The enclosure is in the Committee files.

S. 1999, and its two-tier approach, has been suggested as a solution to what is now recognized to be a multifaceted problem. It is far from perfect, however. Title I should be amended to correct its unnecessarily burdensome record retention provisions. As to Title III, from retailers' some aspects of product seller liability should be clarified so as to reduce the need for litigation over potentially ambiguous sections of the statutory language. Such changes, however, would be modest. They are addressed at further length later in this statement.

Title II presents a number of problems. It proposes an expedited alternative to the current tort system that will allow consumers to recover net economic loss for injuries incurred in using "unreasonably dangerous" products. That is a laudable goal. In practice, however, Title II may achieve this goal at the expense of equity. In the case of private label retailers particularly, the burdens involved in handling claims will in many cases swamp the benefits delivered to consumers. Let us be very clear. We do not necessarily oppose the idea of an equitable expedited claims system, nor do we oppose a system of swift recovery based on net economic loss. We very strongly oppose, however, a system that places the burden of ameliorating such losses on product sellers, especially since they very clearly are not the parties best situated to do so. We are equally opposed to a system that, in seeking to satisfy one party to a transaction, virtually ignores the costs and time constraints it imposes on the other party, be it a retailer or a manufacture. S. 1999 does both.

Title II: Treating Retailers as Manufacturers

Title II, Section 201, provides that persons who have suffered harm caused by a product may bring an "expedited claim" against the manufacturer. Section 102 (9) defines a manufacturer to include a product seller with respect to any aspect of a product it actually produces or to the extent it modifies the product of another manufacturer. It is a resonable definition. However, the final subsection of Section 102 unilaterally would treat every retailer of private label goods as the actual manufacturer of those goods, regardless of their actual involvement in the goods' production, simply because of the label affixed to the product. That is unfair. It is also unwise. Product sellers have neither the technical expertise nor resources to accurately resolve claims.

As to private label goods, retailers may choose from a manufacturer's offerings, numerous items differing in such features as style or color, to which each retailer affixes its label and offers them to consumers as "their" line. Such choosing does not confer upon the retailers any greater knowledge about the actual design or manufacture of those products than if they sold the same items under the actual manufacturer's brand name. It does, however, ofttimes allow retailers to offer the merchandise at a lower price than if it were sold under the brand name.[1]

As currently drafted, this provision would saddle private retailers not only with the considerable transaction costs of resolving claims under Title II, but would also require that private label retailers attempt to become as knowledgeable as the actual manufacturer about the design and operational aspects of the products they sell. A moderately large retailer may have dozens of hundreds of privately labelled items in its stores. Given the volume and variety of products on retailers' shelves, this legislation sets an impossible task. Title II assumes that when an individual files an expedited claim against a private label retailer, that retailer can, within a short period of time, become sufficiently knowledgeable about the design, production and use of the affected product to determine whether the individual's claim that the product is unresonably dangerous is valid. In most cases, private label retailers simply will not be able to make that determination accurately. The parties with expert knowledge as to products' inherent qualities and flaws are its actual manufacturers, not its private label resellers. To legally presume otherwise is unfair.

When a claimant alleges, for example, that a dress shirt has caused an irritating skin rash, the fact that a local retailer hung its store name from the shirt's sleeve does not make it qualified to assess the validity of that claimant's claim. The private label retailer simply does not, and cannot, have such specialized knowledge about so many different kinds of products.

A reasonable alternative exists. The retailer should be allowed to drop out of a claim by expeditiously identifying the actual manufacturer of the product. So long as recovery is possible against the actual manufacturer, substitution, in most cases, will actually speed resolution of the filing. The primary manufacturer of a product will likely have the expertise to know, for example, whether certain fabric, dye or processing combinations have previously produced a particular kind of rash in a certain percentage of the population. If the claimant's situation is in accordance with that knowledge, a rapid resolution, and a fairer one, is far more likely.

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[1] It would be ironic if, as a consequence of their efforts to pass on these savings to consumers, Section 102 were to impose upon private label retailers the extra costs associated with handling claims under Title II. An alternative, of course, is that retailers would only carry the more expensive brand merchandise.

Furthermore, by bringing together the two parties with actual knowledge as to the product and its problem, the additional transaction costs involved in resolving a claim, first between the retailer and the claimant and then a second claim between the retailer and the manufacturer, are eliminated. Allowing the retailer to drop out in favor of the actual manufacturer also avoids an unfair whipsaw against the retailer. If a local retailer denies a claim because it hasn't the expertise to immediately recognize its merit, the retailer might subsequently be found liable for penalties and interest under Section 208. On the other hand, if a retailer pays a claim, say for burns caused by an allegedly defective iron, it might subsequently be unable to recover from the actual manufacturer, who maintained that its iron design could not have caused such burns unless it had been abused.[2] No reasonable public policy justifies such a result, especially when a less expensive, easily effectuated alternative exists.

As was noted above, if an actual manufacturer is not solvent or, for some reason, not available to the claimant, then equity suggests that the private label retailer step into the actual manufacturer's shoes regardless of the difficulties associated with that position. But, outside of those situations, there is no reason to whipsaw the retailer and possibly hamper the accurate asessment of the claimant's filing by legally insisting that the private label retailer attempt to fulfill the actual manufacturer's role, unless that seller has actually designed the product or provided exact product specifications.

Level of Claims

The costs of litigation under the current tort law system insures that it sporadically protects only those who incur severe injury. It does little or nothing for those who suffer moderate injuries. Title II may address those latter claims on a cost effective basis. It should not, however, be stretched so far as to make its use impractical.

As proposed, S. 1999 sets no lower limit on the size claim that may be filed under Title II. Since every claim, regardless of its size, will entail processing and possibly investigation by the private label retailer, one of two results will occur. Either the law will saddle the retailer with high costs for settling modest claims, or it will inadvertently encourage unjustified and frivolous claims.

To investigate claims, to verify work, medical and employment records, to interview witnesses, to physically inspect a product and injury sites and to analyze product failures are not inexpensive processes. Few retailers or manufacturers would voluntarily make payments on claims without determining that they are warranted. But if the cost of investigation exceeds the value of the claim, it produces an unavoidable dilemma. Consistently paying claims without investigation invites spurious claims. Consistently paying as much (or more) to investigate a claim than it is worth invites bankruptcy. It may be socially and economically self-defeating to attempt to address every conceivable harm. Indeed, the costs of attempting to do so for every minor claim could quickly overwhelm the advantages of establishing an expedited claims system for moderate to large claims.

Time for Response

The current proposal requires private label retailers and manufacturers to respond to claimants' filings within 90 days. That period is too short. As was just discussed, for a moderately complicated case, the many facets of the investigation stage alone could consume three months. For a retailer or a manufacturer inundated with the multitude of small cases Title II will engender, the strict time schedules could easily push them into default. Indeed, the law affords claimants two years in which to compile and file their claims. Ninety days in which to respond is both unrealistic and arbitrary. Both justice and fairness dictate a reasonable amount of time be afforded those parties responsible for evaluating and investigating those same facts—not to mention the time required to assess their own position.

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[2] Ironically, the ensuing suit between the retailer and the manufacturer could result in the claimant being subpoenaed to appear a second time to resolve the issue of whether its use of the product was abusive. And, even if the retailer were to subsequently recover from a manufacturer, the retailer would still have had to bear the legal expenses of pursuing the unnecesary additional claim.

Currently, court litigated product liability claims can take years. Not all of that time is spent awaiting a court date. Months of investigations, research and testimony may be involved. Title II is an effort to improve upon this process. But to improve upon a system that currently delay justice for years, one need not shoehorn all cases into 90 days. If the response period were set at 180 days, for example, it would still represent a vast improvement over the current tort system while significantly reducing the likelihood of a short-changed analysis.

Liability for Harm

Section 205 provides that a manufacturer shall be liable for harm proximately caused by an unreasonably dangerous product, unless the claimant's actions were a "gross failure to exercise reasonable care." This standard is an uncertain admixture of the more familiar "gross negligence" and "reasonable care" standards. We would recommend that the word "gross" be deleted and that claimants simply be held to a standard of reasonable care.

Title I: Record Retention

The record retention provisions of S. 1999 are extreme, and, in the case of private label retailers, redundant. As to the latter, since the actual manufacturer must maintain safety reports on its products as a matter of course, it is somewhat redundant to impose a 25-year retention requirement for essentially the same records on the private label retailer as well. Nevertheless, because it treats the private label retailers as if they were manufacturers, S. 1999 will require this needless duplication.

However, even for actual manufacturers, 25 years is far too long. The useful life of most products is far, far short of 25 years. If an individual complains that he was cut by a poorly designed disposable razor, what useful purpose is served by requiring that the manufacturer retain that complaint for 25 years. The consumer's claim, if there is to be one, will be brought and resolved within a fraction of that time. And, for private label retailers, this provision is even worse. It will effectively require that each store in a chain maintain an archive of customer complaints that in many cases will date back to the store's inception. In virtually all instances, a 25 year record retention requirement is both unreasonable and unnecessary. It will impose enormous costs on every industry.

A blanket 25-year retention of all injury reports is excessive. Had this provision been enacted into law earlier, for example, manfuacturers would still be maintaining incident reports on Hula Hoops, Bean Bag chairs, Limbo sets and Lava Lamps.

Title III

As was mentioned earlier, we generally support the changes contained in Title III. Three areas of improvement, however, should be noted. We question the exemption (in Section 102) of tobacco and alcoholic beverages from Title III. Neither of those consumer products is so radically different from other potentially injurious consumer goods so as to justify their removal civil responsibility assessed through litigated product liability claims. That should be changed.

Also of importance is Section 303(b)(3). It is the apparent intention of this Section to protect retailers from liability for products which they deliver to consumers in essentially the same condition as they were delivered from the manufacturer. It makes sense that if a manufacturer delivers products to the retailer (in sealed boxes or otherwise), which are subsequently passed on to consumers in the same condition that they were originally received, retailers should not, for that reason alone, be made the subject of subsequent civil liability suit. The retailer is merely acting as a conduit.[3] Aside from express warranty claims by the retailer, there should not be a responsibility on the retailer to inspect each sample of every product. That is the apparent intention of this Section.

Unfortunately, it may one day be held that the language produces an inference (because it is couched in the negative) that if a retailer keeps an item on its shelves for some period of time, then it has a "reasonable opportunity" and thus an affirmative obligation to inspect that product. We do not believe that it is intended that retailers are to dispatch temporarily idle sales personnel into the stockroom to open boxes and inspect products just because they have an arguably reasonable opportunity do do so. Indeed, in many instances, products are so packaged that any evidence of prior opening or tampering of the product package lowers the value of the merchandise in the consumers' eyes.

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[3] Of course, as Section 303(c) provides, if the manufacturer is not solvent or available, the retailer might be made the responsible party.

In other words, although the apparent intent of this provision is to clarify that sellers cannot be found liable—under either strict liability or negligence doctrines—for failing to inspect products they did not make, this section arguably creates a new duty to inspect in any case where the "reasonable opportunity" do do so exists. Such a rule appears to impose on sellers a duty which does not exist under present law. (See, e.g., *Ratliff* v. *Porter Cable Co.*, 210 F. Supp. 957 (E.D. La. 1962), holding that a retailer had not duty to "uncrate and inspect" a power saw sold in its original container.) It is also vague because it fails to specify when a "reasonable opportunity" to inspect exists. Unless a need to impose such a standard on sellers is demonstrated, a federally-mandated standard of liability is unwarranted. It should either be amended to state that "the mere holding of an item in stock does not create an obligation to inspect" or else deleted entirely.

Finally, Section 303(c) provides that the product seller should be secondarily liable in a product liability civil action if the manufacturer is neither solvent nor amenable to process. This may be a necessary backstop position. Nevertheless, it should be made clear that any decision as to whether the claimant would be able to enforce a judgment against the manufacturer should be made by the court well before the trial, and certainly before the closing of discovery. It would be manifestly unfair and a denial of basic due process to allow an action to proceed to judgment against the manufacturer alone and only then make a determination that, because the manufacturer is insolvent, the retailers must pay the manufacturer's debts.

We believe that with these changes, this bill would be more efficient, manageable, and ultimately fairer, both to retailers and to consumers, than is the current draft.

I want to thank you for your consideration of our views. If I can provide any additional information to aid you in your assessment of these issues, I would be happy to do so.

Sincerely,

TRACY MULLIN,
Senior Vice President, Government Affairs.

Racine, WI, April 14, 1986.

HON. LARRY PRESSLER,
U.S. Senate,
Washington, DC.

DEAR SENATOR PRESSLER: We have read you proposed Section 308 to S. 1999 intending to add a provision regarding several liability to the uniform product liability law. We support your efforts wholeheartedly and wish to go on the record in doing so.

As a responsible manufacturer, our company is faced with the prospect of damage awards against us totally disproportionate to any damages our products may have caused. Internally, we have vigilantly attempted to make our products as safe as circumstances reasonably allow, but owing to the present state of the law in many states we face the prospect of bearing the burdens of those who have not been as vigilant as we. Not only is this unjust, but it has the effect of interfering with the successful conduct of our business.

We do support the product liability reform effort of S. 1999 and certainly your proposed amendment of Sec. 308. Fairness demands that such a provision regarding several liability by included in the proposed uniform liability law.

Sincerely yours,

THOMAS H. KRIGBAUM.
Director of Administration.

STATEMENT OF T. TIMOTHY RYAN, JR., AND DIANE E. BURKLEY, COUNSELS FOR THE NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS (NACSA)

Per the request of NACSA Government Affairs Executive Director Joan Albert Dreux, and on behalf of the NACSA Product Liability Subcommittee, this memorandum presents our comments on Senator Danforth's Working Draft II product liability legislation. We have focused our comments on the following key issues which are likely to have the greatest impact on the insurability of tort risks under the comprehensive general liability line of insurance:

The allocation of the burden of proof under Title II;
The criteria governing toxic harm claims under Title II;
The expedited claims handling procedure under Title II;

The absence of a cap on punitive damages under Title III:

The draft legislation's effective date and attendant retroactive trigger of liability; and

The statute of limitations or repose.

A. Burden of Proof Under Title II (Section 205 (a) and (b))

Section 205(a) adopts a strict liability approach to recovery. A manufacturer will be liable to the claimant if the product is "unreasonably dangerous" and that unreasonably dangerous aspect of the product was a proximate cause of the claimant's harm. Knowledge of the danger is imputed to the manufacturer. In addition, the burden of proving that a product is not "unreasonably dangerous" is placed on the manufacturer. That burden can be met only by showing that the product's utility so outweighs the risk of harm that a person knowing of such a risk is justified in placing the product into commerce. This shifting of the burden is a marked retreat from the first draft of S.1999.

Adoption of section 205's "trigger" of liability is troubling for several reasons. First, the complexity of the "risk-utility analysis" is inconsistent with the whole concept of a simplified and expedited claims resolution procedure. The benefit and feasibility issues encompassed by this approach would be virtually impossible to resolve in 90 days; similar issues have taken years for scientific agencies such as OSHA, FDA and EPA to decide and the resulting determinations have generally been quite controversial. Significant litigation can be expected on these issues. Second, the shift of the burden of proof is inconsistent with general legal principles requiring a plaintiff to establish his entitlement to relief. Third, the combined effect of placing the burden of proof on the manufacturer and imputing knowledge of the danger to the manufacturer in all cases—whether they involve construction defects, design defects or the failure to warn—would likely result in recovery in virtually all cases.

Taken together, these standards of liability come close to establishing an absolute "no fault" standard (contrary to Senator Danforth's stated purpose), yet without the reduction in claim resolution costs associated with such a system. It therefore is unlikely to find broad based support among affected constituencies.

B. Treatment of Latent Toxic Harms (Sections 203(d), 205 (d) and (e)

Section 203(d) permits a claimant seeking to recover for a latent toxic harm who is unable to identify the manufacturer of the individual product unit that caused the harm to recover from any manufacturer of a chemical indistinguishable unit. The claimant apparently is not required to file claims with all manufacturers whose products were available at the relevant time and in the relevant market.

We have practical and equitable objections to this provision. It will be virtually impossible for an insurance company to assess a manufacturer's potential liability for latent toxic harms. Some companies would be forced to assume the liability not only for claims arising from their own products, but those of other manufacturers of the product. If a company is singled out by claimants, it could, in effect, be forced to assume liability for the whole industry. While the company forced to pay presumably could file a contribution action against other companies, there is a substantial burden attendant with such litigation. Moreover, under draft S. 1999 it is unclear whether contribution could be had in these nonidentification cases. (Section 211(a) permits a defendant to seek contribution in proportion to the percentage of another person's responsibility for the harm. But the other manufacturer might not have "responsibility" for an unidentifiable product.)

The special liability tests in section 205(d)(1) applicable to latent toxic torts also raise serious concerns. Under the draft bill, there is a conclusive presumption that a product was the proximate cause of the harm if the claimant's exposure is deemed to "significantly increase the risk" of harm. Further, a significant increase in risk is conclusively established if (1) the incidence of harm in an exposed population exceeds the incidence in nonexposed populations by 30% (section 205(d)(2)), or (2) the National Toxic Health Effects Panel established by the legislation determines the risk is significant (section 205(e)).

The 30% rule is extremely troublesome from an empirical point of view because it fails to define crucial terminology such as "exposure" or establish criteria to ensure that only studies which are statistically significant and accepted as probative by the scientific community may be relied upon to establish a 30% increase in incidence of harm.[1] Moreover, the bare existence of a statistical risk, without more, is generally

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[1] Where the sample or cohort studied is small, for example, a 30% increase could easily be within the margin of error. A number of issues, moreover, would have to be resolved to deter-

Continued

deemed inadequate to draw a valid biological inference of causation. Unless these questions are addressed, the 30% increased incidence presumption would weight heavily in favor of finding liability and raise serious due process concerns.

The second conclusive presumption—a determination by the National Toxic Health's Effects Panel of a significant increase in risk—also raises due process concerns because the findings of the panel apparently are not subject to judicial review. See section 213 (d)(3). However capable these career government employees may be, the decisions reached could be scientifically or legally erroneous because of evidentiary gaps, or the members' philosophy as to how to resolve scientific uncertainties. The draft legislation provides no redress from such potentially erroneous findings (other than through reconsideration, which is history is any measure, will rarely result in a changed decision.)

Finally, we would note that the combination of the "proximate cause" and "unreasonable risk" tests result in particularly complex measure of liability. Given the likely effect of the conclusive presumptions discussed above, however, it appears likely tht a claimant would be accorded an almost absolute right or recovery. The insurability of these risks would be highly questionable and surely result in even higher rates than those under the present tort system.

c. Title II's Expedited Claims Handling Procedure

As a conceptual matter, an alternative dispute resolution system can help stabilize the scope and extent of manufacturers' liability and claimants' recovery. It also has the potential for decreasing the costs of litigation, particularly by providing for binding arbitration (with no prehearing discovery and possibly without post-hearing briefs) where the only issue is the amount of net economic loss, providing for expedited judicial review, and limiting the amount of contingent out attorney's fees.

We have strong reservations, however, whether the alternative dispute resolution system, as currently fashioned, will achieve these goals. Given the substantially greater recovery available under Title III, most claimants who could prevail under traditional tort theories are likely to continue to file actions directly in court, if for no other reason than to obtain a more sizeable settlement than under Title II. Claimants with less compelling legal cases, however, will now have an opportunity to avail themselves of the strict liability standards and reversal of burden of proof in Title II. For the reasons discussed above, such a substantial increase in claims would particularly be likely in the latent toxic harm area.

It is possible, therefore, that Title II may simply provide an additional remedy for those claimants who would be unable to recover in traditional tort litigation (in the vast majority of jurisdiction), without reducing the number of successful "traditional" civil actions or settlements under Title III. If this is so, the proposed system will neither increase certainty in the extent of liability nor put an effective limit on litigation costs.

If the expedited claims procedure continues in essentially its current form, we would recommend that serious study be made of the Federal Mediation and Conciliation Service's ("FMCS") ability to handle a large influx of product liability claims without additional arbitrators. Moreover, because this area is not one with which the FMCS has had significant experience (FMCS largely resolves liability—not damage—issues in the labor area), it may well take the agency a period of time in which to develop the expertise necessary for arbitrating a product liability claim.

D. The Absence of a Cap on Punitive Damages Under Title III (Section 305)

The drafters of S. 1999 have commendably limited punitive damages to instances where the manufacturer or product seller has acted with conscious, flagrant indifference to the safety of persons using a product. We would recommend that the legislation go further and establish a "cap" on the amount of punitive damages that can be awarded, such as double the amount of the compensatory award. Such a cap would be more equitable in that it would better ensure that recovery could be had by other claimants, while still being a significant deterrent to improper conduct by manufacturers and sellers. It would also make it possible for risk managers and insurers to better predict the potential liability associated with production of products and potential tort claims.

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mine if a test is to be deemed evidence of "significant risk." For example, are animal studies acceptable? Must the same route of exposure to which the claimant was subject be involved in the study? How will the extent of exposure of the claimant be correlated to that involved in the study, e.g., by time-weighted average?

E. The Effective Date and Retroactive Trigger of Liability (Section 112(a))

Draft II of S. 1999 provides that the Act shall be effective on the date of its enactment and apply to all claims filed thereafter, including those in which the conduct causing the harm occurred before the effective date. Section 112(a). To the extent that Title II invites the filing of new claims under standards that render illegal conduct that was legal at the time it occurred, tremendous unanticipated liabilities could be imposed on manufacturers and their insurers. The cost impact could be particularly severe in some industries. We would recommend that Title II be imposed only on future conduct.

Moreover, whether or not the Act is applicable to past conduct, the immediate effective date would appear unrealistic. The draft legislation requires adoption of a number of procedures—internal review procedures by the manufacturer, and arbitration by FMCS of net economic loss—that will require significant time to implement. This is especially so because as noted, the FMCS may not have an adequate roster of arbitrators to handle a large influx of claims, and may require some time to develop expertise in these matters. These considerations suggest that not even the 120 day delayed effective date provided in the Draft I of the bill may be adeqate, and six months to a year may be required.

F. The Statute of Repose (Sections 210, 306)

The bill establishes a statute of repose applicable to Title II and III claims involving capital goods of 25 years. Sections 210, 306. We question the reasonableness of such a lengthy statute of repose for capital goods under either title. At a minimum, the time limit should be reduced under Title III (e.g., to 12 years) as an incentive to the use of the Title II system.

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57 Campana Road,
London SW6 4AT, 21 April 1986.

Mr. Andrew Koppelman,
227 Senate Hart Building,
Washington, DC.

Dear Andrew Koppelman, thank you for your letter of February 28 which only reached me here in London this week. In view of that delay, I thought it would be most useful for me to respond immediately even though that means that I have not been able to study S. 1999 in the detail I would like. Nor have I benefited from other comments about its predicted operation, comments which I would very much like to see.

I would, of course, be pleased to try to help your committee and Senator Danforth. Also, I would be honored to be asked to testify on the problems concerning you, if you find you are holding hearings at a time when I am back in the U.S. (which will be after August 15, 1986).

As you know from my article "Doing Away With Tort Law" I am highly critical of the existing tort system. Perhaps it is now time for Congress to step in and do something.

Certainly I can appreciate all the pressure you must be getting from dismayed representatives of the business community who can't understand why many defendants are being held liable in the way they are in products cases, and now find they are having trouble obtaining adequate liability insurance as well. It seems clear to me that consumers and victims are also ill served by the current system.

Thus, as a strategic matter as well as a matter of fairness, it seems appropriate to try to work out a kind of political trade which both relieves business from some of the uncertainty it faces and also gives victims a better deal than they now have.

The package contained in S. 1999 seems, at least at first blush, to have been conceived in that vein. Under Title III plaintiffs' tort rights are cut back (at least in many States such as California); but in turn under Title II victims are given access to a new sort of remedy.

I am afraid, however, that I am not convinced that the Title II approach is a sensible one. My objections are both principled and practical.

In principle, I don't see why a special compensation arrangement should be set up for product victims. If supposedly easier access to non-fault and non-tort recovery is to be made available to them, then why not for other victims? This piece-meal approach is bound to lead to a mish-mash, to say nothing of the serious borderline problems it will create and the many instances it will engender of what will be perceived as horizontal inequity. As but one example, think about commercial airline crash victims, all of whom are innocent, but who will be treated quite differently because of the cause of the crash. (That tort too suffers from this problem is hardly an answer.) Indeed, on this ground I generally oppose what I call "tailored compensation schemes" for, say, prescription drug victims, victims of medical accidents, railway victims, nuclear accident victims, DES victims, asbestos victims and the like, all of which have been proposed in the past. Thus, to the extent that Title II is meant to be seen in the vein of other such plans, it is subject to the same objection.

As a practical matter, I am troubled by Title II as well. You have tried, in effect, to create an elective compensation system in which victims of "defective" products have the right to collect their net economic loss from the manufacturer of that product on a one by one basis. This reflects the long-standing call for "elective" no-fault that has been spearheaded by Professor O'Connell.

Any such approach must decide (1) who is permitted to make the election (victim or insurer) and (2) what are the outside boundaries that define those cases in which the election may be made? As I trust you are aware from Professor O'Connell's writings, he has put forward a great variety of possible solutions to these questions.

Major risks in any elective scheme are that (a) where the injurer is able to make the election, he will define the class of benefited victims so as to include virtually only those who would have otherwise been successful in tort suits, and that, by contrast, (b) where victims can make the election, it will be made virtually only by those who now have no case in tort. In either case, the system in operation would fail to serve its goal of reducing the compensation now paid to victims but expanding the class of victims benefited.

To combat the risk created when would-be defendants can elect the lowered damage award, one must try to force injurers to define a broader class of beneficiaries. To combat the risk created when would-be plaintiffs can elect, one must first offer some incentive (like a fast simplified procedure) to those with good tort suits to make the election. And one must also define the outer boundaries on the class of those who can elect in a way that is both broader than those who have tort claims while not being too unfairly broad given the parties on whom the costs of compensation are imposed.

Since yours is a victim election plan, you have had to follow the latter route. But in doing so, you have defined the outer limit on those who can make the election in a very narrow (some might say miserly) way. You haven't allowed product victims generally to make such claims, for example. Rather, you have only allowed those who are victims of defective products as defined in the Act to make the election; and this definition, so far as I can tell, is no broader than, and probably narrow than, the definition of those who have valid tort claims in many jurisdictions today (including California). Moreover, since the definition you propose carries with it all of the same difficult proof problems as do today's definitions of defective products for torts purposes, I don't see Title II as offering anything very attractive to anyone who has a good torts claim.[1] In other words, this approach is very different from a plan, like most auto no-fault plans, which while reducing the amount of damages recovered at least broadly expands the class entitled to recover.

You, of course, do in the end create a class of victims who would be able to make an election to have no-fault recovery for net economic loss and who wouldn't be able to sue in tort, even in California. You do this, of course, by imposing through Title III a national scaleback in the substantive tort law for product injury cases!

The upshot for places like California, I predict, is that nearly all of those who still have tort claims under Title III will sue and will not make the Title II election. Those who used to have tort claims and now don't will try to claim under Title II. This may be fairer to business, but it is hardly the sort of trade that gives victims something better in return.

Of course, not all States have as liberal tort rules as does California. And, if anything, recent statutory reform suggests that many States have moved or are moving on their own to your Title III standard. In such states, too, however, I don't see what strong incentive there is for those with valid tort claims to make the Title II election. Hence, in such States the impact of the Act would seem to be largely to create a new class of (second class) claimants—those who turned out to be victims of what from hindsight we call unreasonably dangerous products but with respect to which the manufacturer was not negligent.[2] That is a gain for victims in those states, but it doesn't seem to be a gain for manufacturers, as I see it.

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[1] As an aside, while I see how your plan is meant to work for so-called design defect and so-called warning cases, it is not entirely clear just how it is meant to work in the old fashioned manufacturing defect cases. Possibly those victims would fail under your definition. If you would explain to me what you have in mind here, I would very much appreciate it.

[2] This class includes those who may not be able to satisfy causation or manufacturer identity requirements for torts purposes in the more conservative states but who would be able to make a Title II claim under your plan.

On this analysis one now clearly sees the sort of trade I think S. 1999 really makes—as among those living and operating in different States. California victims lose and, say, Texas victims win; and at the same time California sellers win and, say, Texas sellers lose. But this doesn't seem to me to be the right way to go about fashioning a fair or sensible package.

If I agree that there is a lot wrong with tort law, but I say I don't like the S. 1999 approach, it is fair to ask what I would propose. Let me outline some ideas.

If you are going to interfere with State law, why not focus just on damages law (and not just for product cases) and leave substantive tort law alone and keep the election format out?

I'd propose the following package to apply to all personal injury victims:

(1) reverse the "collateral sources" rule;

(2) limit pain and suffering awards to, say, $100,000;

(3) deny pain and suffering damages to anyone who is not disabled at least six months or does not suffer serious disfigurement;

(4) award attorneys fees to successful plaintiffs;

(5) award pre-judgment interest to plaintiffs; and

(6) provide that contributory negligence would no longer cause any cutdown in the plaintiff's recovery.

To this package might be added your proposal for the treatment of punitive damages. You will note that the first three provisions in my package help defendants, whereas the second three help plaintiffs.

I would be even much more enthusiastic about this package of tort damages changes if it were combined with the following changes in our basic employee benefit/social insurance system:

(1) States would be required to adopt temporary disability plans of the sort that California, New York and a few others have, but with certain modifications that would both increase substantially the covered wages and increase the wage replacement rate to, say, 85%-90% of the employees' previous net disposable income; and

(2) employers, except very small employers, would be required to provide sick leave benefits for their employees that meet minimum standards, such as 1 day per month cumulating.

With these provisions in place one could go even further and bar tort suits for income loss for the first six months of lost earnings.

Moreover, once you start thinking about this type of reform, then even wider horizons come quickly into view. For example, the temporary disability system can be expanded as well to cover short term injuries from work accidents, thus taking such cases out of the worker's compensation system. And employers with employee health care plans meeting certain minimums can also be exempted from providing health benefits for short term injuries through worker's compensation.

The upshot of these various changes in the temporary disability/sick leave system, the tort system, and the worker's compensation system would be:

(1) virtually everyone would turn for short term wage loss and medical expense compensation to the temporary disability/sick leave system and to their health insurance (including Medicare/Medicaid) but not to either worker's compensation or the tort system;

(2) both torts and worker's compensation would be largely restricted to the serious cases (more than six months disability and/or serious disfigurement); and

(3) when tort cases were brought for such injuries, they would pay damages that looked much more like worker's compensation damages than do tort awards today.

And, to repeat, these changes would not be limited to one class of problems—such as product injury victims or medical accident victims—but, indeed, to the disabled in general.

This full package I have outlined would benefit consumers and business. It would bring about healthy reform of tort law and worker's compensation law. And, it really isn't very complicated.

Needless to say, I would be happy to spell out these reform proposals further if you find them at all attractive. I have actually made a proposal to the California legislature last December along these same lines. It is supposed to have been put in bill form by now and introduced. Unfortunately, I am a bit out of contact living in London. You could pursue this, however, with Mr. Bill George, the main consultant to the California Assembly Committee on Finance and Insurance, who works for the Committee's Chair, Alister MacAlister.

I look forward to receiving your comments on this letter, and hope we can continue to be in touch.

Yours sincerely,

STEPHEN D. SUGARMAN.

STATEMENT OF DAVID E. NETHING, PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES

The National Conference of State Legislatures' product liability policy is in conformance with its general policy opposing the unjustified preemption of state law. NCSL takes a balanced and moderate approach to preemption issues. NCSL approaches preemption issues on a case-by-case basis in the recognition that the federal interest may outweigh the state interest in jurisdiction. NCSL believes, as a general rule, that federal legislation can be justified if three tests are met, i.e., that (1) federal legislation is the only feasible means, (2) of achieving a truly compelling national objective, (3) arising because state actions have seriously burdened interstate commerce and interfered with similar preeminent concerns of the federal government.

The first NCSL test for federal preemptive legislation is that preemption must be shown to be the only feasible means of dealing with the problem. NCSL believes there are other feasible means of dealing with the costs of product liability and products litigation. The insurance cost problem can be addressed by tort reform and insurance regulation at the state level. Some states are moving toward tighter regulation of the insurance industry based on the theory that the high cost and unavailability of some lines of insurance can be attributed to the management practices of the insurance industry, including excessive reliance on interest income for profit, panic pricing in certian lines of insurance, and alleged monopoly tactics to secure higher profits. Another, though not incompatible, approach is taken by states which regard the size and number of damage awards as excessive. These states are reforming their tort law by capping non-economic damages, limiting attorney fees, abolishing the doctrine of joint and several liability, imposing strict statutes of limitation, abolishing the collateral source doctrine, and taking similar measures to reduce the size and number of judgments.

The second NCSL test requires a showing that federal preemption is necessary to achieve a truly compelling national objective. Uniformity for its own sake is not a compelling objective. Every legal issue under state jurisdiction has up to 50 standards of compliance. Some inconvenience and cost in adjusting to interstate variation in legal standards is an acceptable price to pay for the benefits of a federal system. The law in each state reflects the unique social and economic conditions of that community. Moreover, the states can act as laboratories, testing the social and economic effects of different product liability standards.

Under its third test, NCSL believes a showing must be made that state action has resulted in serious conflicts burdening interstate economic activity and interfering with similar national goals. State legislators believe that such a showing has not been made in the case of state product liability law. The proponents of the federal legislation have failed to produce significant evidence showing that the lack of uniformity in the law has resulted in excessive insurance costs.

NCSL believes that the crisis in the availability and affordability of liability insurance has a multitude of causes almost all of which can be dealt with at the state level through tort reform and insurance regulation.

STATEMENT OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

On behalf of the AFL-CIO, the Industrial Union Department, AFL-CIO, the Building and Construction Trades Department, AFL-CIO, we want to express our opposition to the bill S. 1999, "The Product Liability Voluntary Claims and Uniform Standards Act."

As you know, S. 1999 proposes a major legal and social trade-off that seeks to impose a weaker uniform standard of tort liability in exchange for an alternative claims systems that avoids the litigation process. The question "Is the alternative claims system worth the weaker tort standards?"

After considerable study and discussion within the labor community we have concluded that the proposed alternative claims system is flawed to the point where it simply does not provide sufficient relief to workers and other victims injured by defective products to warrant the proposed trade-off. In this respect, we have the following objections to the Title II proposals.

First, and perhaps most fundamentally, the alternative claims system is not a "no-fault" approach. Indeed, in many respects it more closely resembles the tort system itself especially in those cases where a manufacture denies liability. Although it is true that in such cases a claimant can seek a tort remedy, he must do so under the new "negligence" standard imposed by the bill. Should he remain in the alternative system, however, there are still tort-type questions of proving or disproving whether a product is "unreasonably dangerous." This is a far cry from the "no-fault" question, "Did the product cause the injury?" Thus, instead of an easily accessible, readily available and relatively non-adversarial system, what the bill proposes is a complex, difficult and confrontational process that will create just another forum for protracted litigation.

Second, we believe that the direct relationship between the claimant and the manufacturer in this administrative proposal is unsound and unfair to the claimant. Rather than forcing the individual to deal directly with the manufacturer, we believe that a neutral third party—some type of public agency—should provide the administrative and procedural claims framework. Thus the individual claimant and the manufacturer, from the very beginning would meet in a more equal environment, rather than one in which a single individual must, at least initially, face an entire corporation.

Third, the bill's proposed renumeration only for "net economic loss" is overly restrictive as well as definitionally unfair. We believe that in addition to economic loss, an injury which results in a functional loss or a loss in the quality of life must also be compensated. In this respect we note the absence in the proposal (compared to an earlier draft) of compensation for the loss of reproductive capacity. We think that such losses are legitimate subjects for compensation. Perhaps most important, the elimination of "pain and suffering" awards in a system that is not truly "no-fault" raises serious doubt about the adequacy of the trade-off for the claimant. As for the definition of "net economic loss" we particularly object to deducting from the "net economic loss" award the amount of income that might have been earned had the injured party sought available work that he might theoretically have been able to perform. Such a proposal is open to wide interpretation, judgment and gross abuse, as well as being punitive towards the claimant. Moreover, while there might be some justification for off-setting benefits that a claimant received from a source that may have contributed to his injury, e.g. the workplace, there is no justification for off-setting other sources of support.

While we applaud the bill's attempt to deal with the problems of toxic exposure and causation, when all is said and done the victim of toxic harm must still confront the limitations imposed by the other provisions of Title II, including the question of "unreasonably dangerous" and overly restrictive "net economic loss" limitations. Moreover, we are concerned with the bill's definition of a "product" which excludes "industrial waste, atmospheric pollutants and water contaminants" all of which may contain highly toxic material.

When coupled with these and other defects in the alternative claims system, the proposed changes in tort law make the bill unacceptable. Not only do workers and other victims of unsafe products get very little out of the alternative claims system, but if forced into litigation, the bill's new negligence standard makes it more difficult for them to succeed. By reducing the liability standard from one of "strict liability" to one of "negligence," the bill confronts the victim with a much more burdensome legal task. This, of course, is an incentive to seek the alternative route provided for the Title II, but as we have stated, the alternative—with its overly restrictive formulations and limitations—provides little in the way of real additional benefits. The combination of Title II and Title III provisions, therefore, not only unfairly burdens the victim, but, we believe, substantially weakens the incentive for manufacturers to produce safer workplace and consumer products. Promoting and furthering this safety incentive should be an overriding goal of any legislation.

In addition to our concerns over the imposition of the negligence standard as a national test of liability, we are also disturbed by Title III's so-called "complete defense" for manufacturers of products provided to the federal government for use in defense and aerospace applications (Section 302(i)). At a minimum, we believe that this provision would severely complicate, it not completely negate, much of the current litigation on asbestos and asbestos-related diseases. Moreover, we see no compelling reason to effectively exempt these types of products from litigation, particularly as they may relate to civilian workers or non-military consumers.

In conclusion, we would like to commend you for making this honest effort towards compromise. For the record, we want to make it clear that the labor movement has grave concerns with the current tort system with its long delay, huge expense, and uncertaintly of recovery. We are interested in a reformed tort system that provides incentives for quick and fair settlements. Further, we would seriously consider supporting a truly "no-fault" alternative to litigation that provided easy accessibility, a neutral claims system, and recovery for economic and quality of life losses. In terms of this particular bill, however, we believe that it does not meet the criteria necessary to achieve the kind of reform expected by those whom we represent.

STATEMENT OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. Chairman, NFIB on behalf of our more than 500,000 members, welcomes the opportunity to present the views of small business on the crisis in product liability. NFIB applauds the Chairman for having taken the initiative in this area, one which is and continues to be in need of urgent reform, and for having nurtured it through those long days when no one wanted to hear about it. Senator Danforth, Chairman of the Commerce Committee, also deserves mention for his efforts to move the debate on a national product liability standard off center—where it has remained for too long—and to enact a measure that reforms the product liability tort system in a responsible and rational manner that meets the concerns of the business community and protects the rights of consumers with legitimate claims to recover damages.

Several weeks ago we had the opportunity to present our views on the nature of the general liability insurance crisis to the Committee. At that time, we recommended options for reforming both the tort system and the insurance industry as possible solutions to this ever-increasing nationwide problem. Today I hope that we can provide additional suggestions on one facet of that crisis: product liability.

Product liability tort reform, in the nature of a federal standard would be dead in the water today were it not for the general crisis in liability insurance. I state this fact with some confidence, given the results of three votes taken of our members on the question of a national product liability statute. It would be an understatement to say that small business generally favors legislative action at the state and local level as opposed to federal activity in any manner. For them to support federal action indicates that a solution at the local level is next to impossible. Small employers support federal initiatives with great reluctance, especially in the area of tort law.

That is why the shift in the views of NFIB members is both significant and important. In 1981, only 37% of our members supported creation of a national product liability tort standard. That figure rose to 45% in 1982. Three years later, (we polled the question in December of 1985) the results were astounding: some 65% of NFIB members favor enactment of a federal product liability statute. The numbers speak clearly that the time for action at the state level has long passed and that federal involvement is needed.

In the same breath, though, let me also state that our members have been polled on several provisions of S. 1999 in particular, and the results are mixed. In October of 1985, NFIB members were asked if they favored retention of the right of subrogation in a federal product liability statute. As you know, subrogation allows an employer or the insurer the right to recover the cost of workers compensation paid to an employee if that same employee is successful in achieving a claim against a manufacturer in a product liability suit. Our members voted by an overwhelming margin of 72% in support of preserving the right of subrogation available now to employers and their insurers in a majority of states.

I will concede the point that opponents of subrogation make, that given the current strict liability standard for most product liability suits, there may be some employers who are being provided with an incentive not to maintain as safe a workplace as possible. However, given the changes in Title III, i.e. negligence on the part of a manufacturer must be shown in order to receive a judgment, innocent employers who maintain safe workplaces will be adversely affected if subrogation is eliminated.

Additionally, in light of Title II, subrogation does not apply since no finding of fault is necessary to recover. Since it is the intent of the authors of S. 1999 to encourage the use of Title II over Title III, the question of subrogation may be moot in a majority of the cases. Therefore, in the context of the bill as currently drafted, small employers who maintain safe workplaces are being unjustly penalized so as to limit the costs owed by a negligent manufacturer in Title III cases. NFIB strongly urges this Subcommittee to re-examine these provisions of the bill with an eye toward remedying this penalty.

Turning now to Title II, it is an understatement to say that this section of S. 1999 represents a daring, innovative, yet controversial approach to decreasing litigation and transaction costs while ensuring the prompt payment of legitimte claims made by victims. Our *Mandate* results reflect the uncertainty of sailing into uncharted waters. On the subject of whether or not an expedited claims procedure should be established, as contained in S. 1999, preliminary results show 50% of NFIB members support such a system, with 32% opposed and 18% undecided.

The same cannot be said for the flip side of the expedited claim. I am referring to those sections of Title II which state that fault need not be determined for a claimant to recover. The claimant has only to show that the product was the proximate cause of the harm and was unreasonably dangerous. Seventy-two percent of NFIB members strongly oppose attempts to reform the product liability tort system in this fashion. In their view, a finding of fault is necessary to restore integrity to a tort system, in which a finding of negligence on the part of the manufacturer, as the basis of recovery, is more honored in the breach than in the observance.

The importance of this point cannot be overstressed. The extension of what constitutes liability by the judicial system, at the chronic urging of the plaintiff's bar, has undermined the confidence, and some would say the ability, fo American industry to continue to produce goods in an innovative, competitive, and safe fashion. As a result, sound businesses are being forced to remove profitable products from the stream of commerce. This not only adversely affects our own citizens (as in the case of pharmaceuticals); it also impacts our nation's ability to compete with foreign countries.

There is a price that society has agreed must be paid for protecting the rights of victims to redress their injuries. The question we must ask ourselves is, are we willing to risk a continually increasing share of our national income in this cause? If this state of affairs persists indefinitely, there will be no manufacturers for victims to collect from, for they will all have gone out of business. There will be no consumers spending money to purchase products, since they will have been laid off from their jobs, and there will be no tax revenues to run the government.

I would also like to echo statements made by several witnesses at an earlier hearing on S. 1999. Title II, while it may decrease litigation (and there is much debate as to whether or not this goal would be reached), may very likely increase the total number of claims filed against manufacturers and ultimately paid.

One additional area that I would like to touch on briefly is the section of Title II dealing with toxic harm. With the knowledge gained over the past decade as to the health effects of long-term exposure to toxic agents, it is clear that this problem must be addressed not only in this measure but in other appropriate legislative vehicles. The high level of public support for the Superfund program is evidence of this. Our members, though, question the manner in which this Subcommittee is proceeding in this area.

I would state—and others will certainly argue the point—that our research into the nature of illnesses related to long-term exposure to toxic agents is not sufficient, exhaustive, or conclusive enough to include provisions in the bill that provide recovery for victims of toxic harm. In our view, how can provisions for recovery be made without full and accurate knowledge as to which agents are harmful, to what extent, and over what period of time?

Once again, I want to thank you for allowing our nation's small employers the opportunity to share their thoughts on this extremely complicated and pressing issue. We offer our services to the Chairman to work in achieving true and lasting reform of the product liability tort system, reform that will be fair to both the manufacturer and the consumer, to the employer and to the employee. The symbol of justice has two scales. Only when they are balanced can it truly be said that justice has been served. Thank you.

STATEMENT OF THE AIR TRANSPORT ASSOCIATION OF AMERICA

The Air Tranport Association of America appreciates the opportunity to offer to the Committee its views about the extraordinary changes that are occurring in tort law and their implications for liability insurance markets. Our members generate about 90 percent of the revenue passenger miles that the U.S. airline industry flies and operate nearly all of its cargo service. Consequently, they experience fully the effects of the problems that afflict tort law and the liability insurance markets.

We believe that the Committee's exploration of the tort law system, particularly that branch of it that concerns product liability, and the liability insurance system is both timely and necessary. Tort law has been undergoing powerful changes for over a decade and those changes have recently had especially pronounced effects upon the insurance markets. Quite remarkably, the impetus for those changes has not been, for the most part, state or federal legislation. Rather, it has been the result of litigation among private parties. Although negligence law is essentially judge-made and results from the resolutions of individual disputes, it can have profound effects upon society. We, therefore, are pleased that the Committee is exploring this matter.

We believe that two principles should be recognized when the current problems that affect tort law and liability insurance are examined. First, any person who suffers harm because of the wrongful action of another person should have the opportunity to receive just restitution for that harm. Second, excessive or otherwise inappropriate restitution benefits individuals who are fortunate enough to receive it but it can create enormous direct and indirect costs for society.

As negligence law has grown beyond its traditional confines, it has increasingly shaped business developments and in many instances we do not believe that that effect has been wholesome for society. Rapidly rising, and often unpredictable, costs associated with tort litigation diminish risk taking and innovation, as well as inflating prices for services and products. To state the obvious: the recent experience of various businesses with negligence and product liability lawsuits has induced significant, and often otherwise unneeded, changes in their behavior, including their unwillingness to offer to the public new services and products. Changes of that sort are detrimental to our society, which historically has benefitted from service and technological innovations.

The economic and innovative costs that current tort law awards impose require public bodies, such as this Committee, to examine the elements of the tort law system that may be contributing to unjustified or excessive judgments. Otherwise, society—and not simply businesses—will more and more suffer the adverse consequences of those judgments. We suggest that the following matters be explored: Creating alternative means of dispute resolution; Modifying or eliminating joint and several liability; Limiting attorney contingency fees; Limiting non-economic awards, such as pain and suffering, and punitive damages; and Requiring disclosure of collateral compensatory sources.

This list, of course, is not exhaustive. Scrutiny of the tort law system, however, is necessary. We need to examine the components of tort judgements, their justification and their effect upon our society. This examination should not jeopardize those persons who look to the tort system to receive just compensation for their injuries. If it not undertaken, however, we must resign ourselves to the worsening of the shortcomings affecting the tort law and insurance systems that many observers have vividly chronicled.

The airline industry has traditionally looked to insurance carriers for liability protection. In recent years, our ability to obtain that needed protection has diminished. Our experiences are discussed below. Some of our experiences are common to other industries, but some are unique to the airline industry.

What are the problems with liability insurance today? At the threshold, the whole insurance market has dramatically changed. The reinsurance market is especially affected. London reinsurance underwriters and brokers are currently forecasting up to a 40% dimunition in reinsurance capacity for aviation and casualty programs. Moreover, as the proportional and excess-of-loss reinsurance treaties came up for renewal at the beginning of January, experts foresaw reinsurer insistence upon an increase in the retention of coverage by the original insurer and as much as a doubling of the premiums. Indeed, the insurance trade press has already reported a doubling of the product liability premiums paid by a major U.S. airframe manufacturer.

As a consequence of the constriction of reinsurance possibilities, the insurance market has become unwilling to cover certain risks at the levels that our industry requires. An example of this limited capacity for certain risks is the situation with regard to directors' and officers' insurance. Where costs recently have commonly doubled and tripled for the business involved, while the limits available at the time of policy renewal are one-quarter to one-third of the expiring coverage. In addition, renewal policies are being written with new exclusions, limitations and conditions. Thus, for example, sudden and accidental pollution coverage, which was previously covered without qualifications, must now be the result of a specific occurrence. Indeed, the airline industry is finding that there is *no* coverage available for certain risks. A dramatic example of this is the insurance market's treatment of environmental impairment liability, which concerns seepage from leaking underground storage tanks. This type of insurance previously protected airlines in their storage of jet fuel. Unexpectedly, in 1985 no coverage for such insurance could be found in the traditional insurance market.

What this suggests, and the three attached charts demonstrate, is that the airline industry is experiencing dramatic increases in its insurance costs. Thus, those airlines which collectively account for 97.4 percent of the commercial air carrier operations in this country, the so-called "majors" and "nationals", saw their insurance costs rise 20 percent between 1983 and 1984 (Chart 1). The hull insurance element of this total rose from $79 million in 1983 to $90 million in 1984, while the passenger liability insurance element rose even more dramatically in that time period, from $53 million to $69 million.

Charts 2 and 3 portray the distressing trend even more clearly. The data used to establish the trend lines that are depicted on these charts are taken from the carrier reports to the Department of Transportation for the first quarter of each of the five years depicted.[1] In the case of hull insurance costs (Chart 2), the rate, which slowly drifted downward from a level of 30.8 cents per $100 of net book value in the first quarter of 1981 to 28.6 cents in the first quarter of 1984, soared to 40.1 cents per $100 of net book value in the first quarter of 1985. A similar trend is reflected by experienced passenger liability insurance costs (Chart 3). In this category, the cost as expressed in cents per 1000 revenue passenger miles was 17.1 cents in the first quarter of 1981, 18.5 cents in 1982, and 18.9 cents in 1983, 17.7 cents in 1984, and suddenly rose to 30.2 cents in the first quarter of 1985.

In considering these three charts, one must bear in mind that none of them reflects the tragic experience of the world's commercial airlines in 1985. While these airlines collectively suffered $2.5 billion in hull losses during the ten-year period from 1975 through 1984, and only about $60 million of that total in 1984, they experienced about $.5 billion in hull losses in 1985. Similarly, while there were but two fatalities in commercial airline accidents in 1984, there were about 1500 such deaths in 1985.

The question naturally arises: Why were airline insurance premiums skyrocketing well before any reflection of the 1985 experience? There are, in our view, two reasons. First, the insurance industry's underwriting losses were previously outweighed by their investment profits and the effects of inflation. Therefore, observers have asserted, underwriters kept some bad risks on their books. However, with declining interest rates and the consequent dampening of investment profits, as well as the diminution of the rate of inflation, the underwriters are no longer willing to take such losses. Second, and most importantly, the tort system in this country today produces extremely high awards and settlements for the claimants, unduly protracted and expensive litigation, and a constant incentive to seek new, imaginative grounds for damages. With regard to passenger fatality settlements for airline accidents, the average level in this country is five times higher than it was ten years ago. Moreover, the average is currently about 14 times higher in this country than the average in the rest of the world. The result, of course, is the ever-increasing attractiveness of U.S. courts to litigators and claimants alike, regardless of the site or nature of the accident.

The airline industry is exploring ways to remedy or ameliorate this situation. New participants and markets for insurance are being sought, but aggressive efforts have indicated that this avenue offers very limited hope at this time. Some airlines are accepting increased deductibles in their contract renewals. Some of these deductibles are effectively forced upon them while others are voluntary, but the net result is an estimated doubling of the deductibles in the most recent round of contract renewals. Airlines are also reducing the insured value of their fleets in order to reduce the insurance costs to a palatable level. The trend through the years has been for airlines to abandon insuring their fleets at replacement value and move to a market value level. Now, the trend is increasingly toward insuring the fleets at a level not too much higher than the current book value.

The industry is also examining a variety of alternatives to traditional markets for certain risks. For example, industry cooperatives, similar to those being funded by municipalities for self-insurance pools, are being explored. Captive insurance companies are being seriously considered for such risks as environmental impairment liability. And, the world's airlines collectively are looking at the possibility of activating a captive company for coverage of some share of their hull and passenger liability exposure.

Claimants are being informed increasingly of the high cost of the current tort system in which, for example, it has been found that 39 cents out of every dollar spent in asbestos litigation goes to the claimants, while 61 cents goes to lawyers' fees and other legal costs. Similarly, press reports indicate that less than half of the money spent in Dalkon shield cases is going to the claimants. In the case of aviation accident litigation, the Institute for Civil Justice of the Rand Corporation has a study underway to determine the costs, in time and dollars, of the current system of compensation through litigation. It is understood that the results of this study will be made public late this spring.

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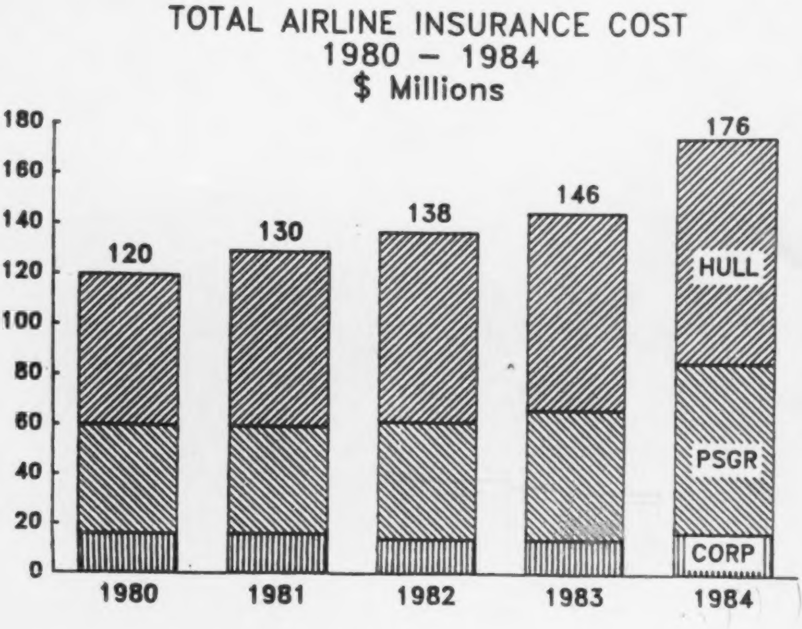
[1] The first quarter represents the only period in a calendar year when no airline insurance contract is renewed. Since these contracts are renewed annually during the remaining nine months of the year, the first quarter reflects the rates agreed upon in the course of the renewal negotiations of all carriers during the previous year.

In addition, in order to avoid protracted and expensive litigation as is often the case in adjudicating aviation accident claims, the airline industry supports the introduction of domestic and international no-fault aviation-accident liability regimes. This can be achieved domestically through enactment of legislation which we understand will be introduced in this session of Congress, probably after completion of the Rand study. Internationally, it can be achieved through ratification of the Montreal Protocols which would amend the Warsaw Convention, together with implementation of a supplemental compensation plan providing unlimited economic damages for U.S. citizens and others purchasing their international tickets in this country. We expect that step to be pursued by the Administration this year, in keeping with similar action being taken by responsible governments worldwide.

The airline industry is convinced that, if these and other legislative reforms are not achieved in timely fashion, the trends portrayed in our attached charts will accelerate, aircraft and engine manufacturers will be inhibited from producing new products, airline and general aviation consumers will be inhibited from purchasing new products, and the cost of air transportation to passengers and shippers alike will rise.

We, therefore, look forward to working with this Committee and others in the Congress in developing legislative and treaty reforms necessary to avert the impending crisis. The airline industry applauds the leadership exhibited by the Committee in calling for the exploration of the facts and the consequences of the worsening of the shortcomings of the tort system and the related problems afflicting insurance markets, which are adversely affecting businesses, professions and, ultimately, consumers throughout the country.

Chart 1



TOTAL AIRLINE INSURANCE COST
1980 – 1984
$ Millions

Chart 2

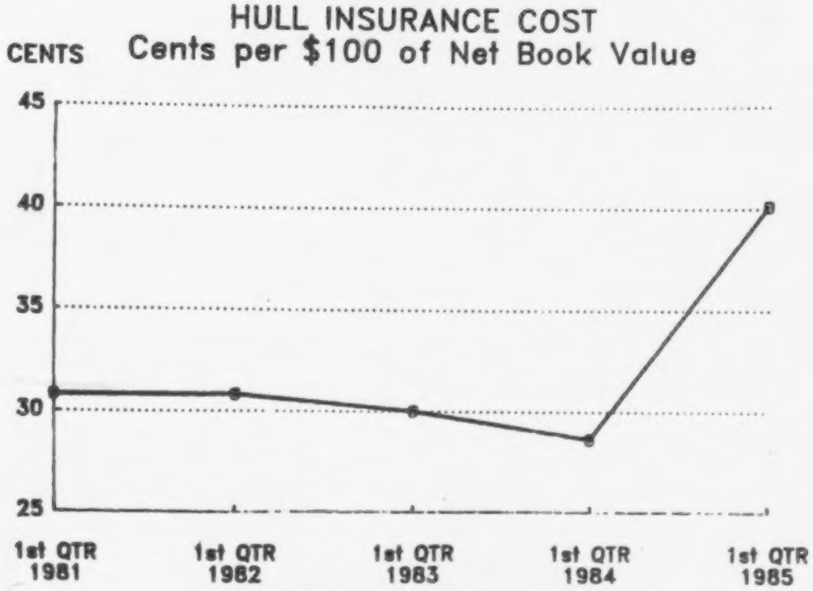
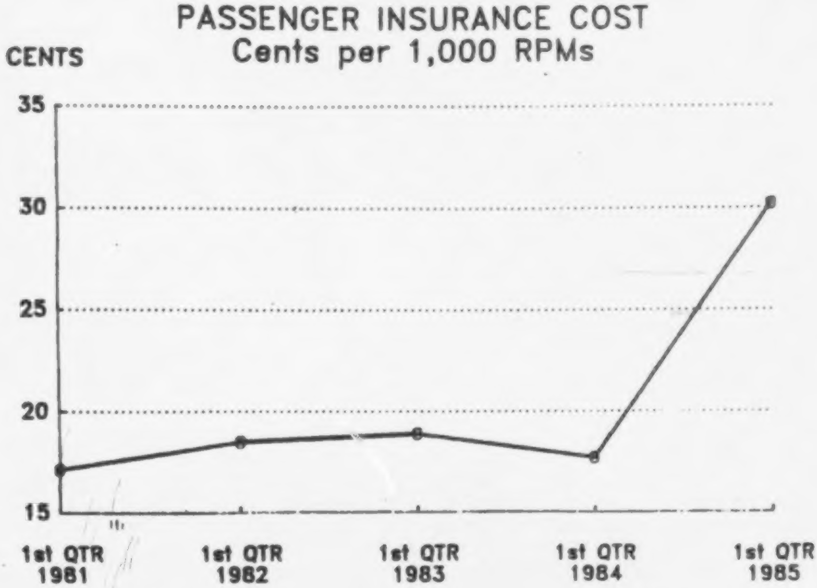


Chart 1



Statement of the American Insurance Association

The American Insurance Association (AIA) is a trade association which represents 177 property and casualty insurance companies. The member companies of the Association provide the majority of the liability insurance coverage written throughout the United States. We have been asked to present testimony associated with the scope of the availability and affordability of product liability insurance as well as on S. 1999, the Uniform Product Liability legislation introduced at the end of the last session by Senator Danforth. We applaud Chairman Danforth for his recognition of the product liability problem and believe that the introduction of S. 1999 is a positive step in our search for a solution to this critical problem.

General liability insurance rates have increased sharply during the last two years. The principal reason for increased rates is the dramtic losses that we have recently suffered in this line of business. Tetimony provided to this Committee by various product manufacturers and sellers has demonstrated that the number of product liability claims and the number of awards has gone up dramatically in the last ten years.

In most instances, insurance companies pay for these huge awards. It is therefore not surprising that insurance rates increases for product liability insurance has gone up dramatically as the risk associated with the sale or distribution of a product has been heightened by a tort system gone astray.

UNDERLYING CAUSES

Traditionally, tort law punishes those who have done wrong by making them compensate those whom have been injured as a result of their actions. Increasingly, however, tort law has evolved so that it punishes those who have done no wrong but instead have the ability to compensate the unfortunate. The trend is particularly pronounced in the expansion of strict liability doctrines in the areas of design defect and failure to warn. Strict liability though more generous to plaintiff than common law was nevertheless still a fault based system. Yet Recent court decisions have created new and unpredictable liabilities for property casualty insurers. As stated in the "Villanova Law Review:"

> In two recent toxic tort cases, the highest courts of California and New York have held that liability for injuries allegedly caused by DES can be imposed upon defendant manufactures without proof that those defendants made DES which caused the plaintiff's injury. In *Sindell* v. *Abbot Laboratories* (1980), the California Supreme Court accomplished this result by fashioning a "market share" theory of liability. Under this theory each defendant was liable for the proportion of the judgment represented by its share of the DES market unless the defendant could demonstrate that it could not have made the product which injured the plaintiff. Susequently, in *Bicher* v. *Eli Lilly & Co.* (1982), the New York Court of Appeals affirmed a jury verdict against a manufacturers of DES which is based upon the plaintiff's theory that Lilly, in concert with other DES manufacturers, had wrongfully marketed this drug without proper testing. Under this "concert of action" theory, the court in Bichler found the defendant liable for the plaintiff's injuries even though the plaintiff had failed to prove that Lilly—the only defendant named in the suit—was the manufacturer of the DES that the plaintiff's mother had ingested.[1]

In both Sindell and Bichler, the rationale underlying the courts' decisions was the same. In both cases, the court was confronted with an innocent victim unable to prove which manufacturer harmed her because of the long latency of the injury coupled with the similarity among the products of the different manufacturers. Faced with a choice between not compensating the victim and holding liable a company wich may not have caused the harm, each court chose a theory which would permit compensation of the victim.

Similarly, court decisions have weakened defenses based upon the state of the art and technological or economic feasibility. In *Beshada* v. *Johns Manville Products Corp.* (1982), a strict liability case in which the plaintiff asserted that an asbestos manufacturer was responsible for damage arising out of the use of asbestos the New Jersey Supreme Court ruled that the defendants could not introduce state of the art evidence supporting their claim that the health hazards arising from exposure to insulation products containing asbestos was scientifically undiscoverable at the time the plaintiff suffered the injury. The court reasoned that if the cost of the injuries is imposed upon manufacturers then the manufacturers can spread the loss by purchasing insurance and incorporating the costs of the insurance in the product's price. Yet, the *Beshada* defendants correctly reasoned that the because unknown hazards cannot be predicted, the costs of these hazards will not be reflected in the price of the products, but instead will be borne by the public at large through general undifferentiated price increases. The court, more interested in compensating the asbestosis victims, conceded that although there was "some truth" to the defendants arguments," it is not a bad result." Uncertainty exists as the court abandoned precedent to advance a compensation system for an entire class of plaintiffs. Needless to say, product suppliers and their insurers remain strongly concerned as to whether or not legal environment will continue to evolve to their detriment.

These fears have been bourne out as other courts have expanded upon this New Jersey decision. In *Elmore* v. *Ownes Illinois* (1984), the Missouri Supreme Court expanded the decision by denying the defendant the use of the state of the art defense in a strict liability case involving the *design* of a paint which contained an additive that was found to be harmful 20 years after the product was first marketed.

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[1] Villanova Law Review, Volume 28, No. 6, September, 1983, p. 1102–1104

Those who support these recent court decisions usually focus on fairness to the victim. In a case involving an unknowable risk, they conclude that, as between two innocent parties—the manufacturer and the consumer—it is fair to shift the financial burden to the party who caused the injury.

Yet they neglect the fact that this imposes an impossible task on insurers and imposes an unfair burden upon a product manufacturers and to society as a whole. Manufacturers should not be forced into bankruptcy merely because they had the misfortune of producing dangerous products at a time when those dangers were scientifically unknowable. Society suffers as manufacturers are reluctant to introduce or maintain the sale of certain high risk but very beneficial products to those who need them.

American pharmaceutical and chamical manufacturing companies face increased exposure to liability at every turn resulting in higher liability insurance rates and significantly reducing their ability to meet the challenges from international marketplace competitors who are not so burdened by court decisions in their countries of origin. This is true even where they have done everything possible to avoid injury and have met or execeeded all legal and regulatory requirements. While 13 firms manufactured football helmets just a few years ago now there are only two as their competitors were forced to discount operations because of increased liability exposure. A nationwide shortage of the DPT vaccine against diptheria and whooping cough exists because of the high liability exposure associated with the sale of this very beneficial and highly regulated product.

The cases are not always as esoteric as those which were cited earlier. In *Faust* v. *Swift and Company* (1985), a Pennsylvania court recently held that a peanut butter manufacturer may be held liable for the brain injuries suffered by a 16-month-old infant as a result of choking on Peter Pan Creamy Butter Spread. The court totally dismissed the assertion of the manufacturer that the infant's mother knew or should have known the potential dangers associated with feeding a peanut butter sandwich to her son.

In another Pennsylvania case, a man won a $1.2 million award, $550,000 in damages from Sears after suffering from a heart attack while trying to start his mower. The man who had a history of heart disease charged that the pull start on this Sears lawn mower required to much exertion. Yet, had it been easier a child might have started the mower and exposed Sears to similar damages.

Under this environment it is not surprising the insurers are having an almost impossible time in evaluating the risks associated with the sale or manufacturer of a product. Courts have not totally rewritten retroactively the basis of tort law but have changed it to apply most harshly in instances where businesses or municipalities with "deep pockets" are the defendants. A study by the Institute for Civil Justice of 9000 jury trials in the Chicago area shows that jurors returned one third more damages against corporate defendants than against individuals.

Clearly the problems brought about because of the dramatic changes in our tort laws have not been limited to product liability cases. Municipalities, day care centers, restauranteurs, truck fleet operators and corporate directors and officers are a few among a long list of entities that have found their exposure to liability increased in recent years as courts expand the theory of joint and several as well as strict liability. The American Insurance Association is aggressively working in the state legislatures throughout the nation for state law reforms that will more narrowly reduce liability to instances where the party acted with fault. Because 70 percent of all products manufactured are sold in interstate commerce a state oriented solution for product liability risks might not be necessarily effective for solving the liability problems associated with the production and distribution of manufactured products. Individuals will inevitably forum shop and seek to bring their cases to courts in states where they are most likely to prevail.

AIA'S CONCERNS ABOUT S. 1999

AIA remains supportive of Title III of S. 1999. The legislation reaffirms the traditional principles of tort law and imposes liability upon a manufacturer: (1) where his product was the proximate cause of the harm sufferd by the claimant; and (2) where he was negligent in either the construction or design of the product or in providing warning or instructions about a danger connected with the product. The enactment of Title III would impart greater certainty to the tort system, making it possible for risk managers and insurers to predict the potential liability associated with the production or distribution of products.

While we are not opposed to the development of an alternative compensation system such as that proposed in Title II, we nevertheless have concerns over its current formulation. Specifically, Section 203(d), which permits an individual to recover for damages in instances where it is impossible to identify the manufacturer of an indistinguishable product, should be amended to provide that liability would only attach to activities that are representative of market share. Should joint and several liability exist, it would be almost impossible for insurance companies to assess the degree of potential liability and a number of products would remain uninsurable.

In addition, Section 205(b) adopts the California Supreme Court decision in *Barker* v. *Lull Engineering* which places the burden of proving that a product is not "unreasonably dangerous" on the manufacturer, and in addition, imputes knowledge to the manufacturer. It establishes a risk utility test under which the manufacturer can overcome the presumption of liability only by demonstrating that the product's utility so outweighs the risk of harm that a person knowing of such a risk is justified in placing the product into commerce.

The problems of insuring an action in which the burden of proof lies with the defendant becomes even more difficult by the narrow discovery rules under Title II. The knowledge of whether or not the claimant used the product in a negligent manner rests almost entirely with him and under Title II the defendant would have an almost impossible time in ascertaining the true nature of the incident that gave rise to claim.

As an alternative, we recommend that Section 205(b) establish more objective guidelines governing the respective responsibilities of both the product producer and the product user. A claimant should be required to demonstrate by a preponderance of the evidence that the product in normal use was the proximate cause of the harm suffered and that the product was unreasonably dangerous. For the claimant to prevail he should have to demonstrate that the product: (1) differed in material respect from the manufacturer's own specifications in a manner making the product unsafe for the use intended by the manufacturer; or (2) the design of the product is unsafe for use in the manner intended by the manufacturer; or (3) that the warning of the risks associated with the product's use in its intended manner was inadequate to enable the claimant to avoid those risks or to make an informed decision about assuming them. On balance, we believe that the language contained in the first draft better accommodates our views.

Our third concern lies with Section 205(d) which governs cases where a claimant has suffered a toxic harm that manifests itself only after many years of exposure. It creates a presumption of causation if a plaintiff was exposed to a chemical or toxic agent, without either defining what constitutes exposure or whether or not the chemical product was unreasonably dangerous. The burden becomes all that more greater for the defendant as the product manufacturer is denied opportunities to refute the allegations asserted by the claimant.

While subsections 205(d)(1)(B) and 205(d)(2) seek to provide clarifications governing the attachment of liability, they are inadequate in that regard. The terms of both subsections are loosely defined and the 30 percent elevation threshold established in (d)(2) fails to define the control group or provide assurances that the tests conducted are properly performed. Furthermore, the language appears to preclude consideration of other factors that might have more greatly contributed to the harm suffered. This would include in part other toxic substances, dietary habits and the genetic predisposition of the claimant. It is indeed possible that the implementation of this section would only result in the invitation of claims in which a claimant would enjoy an almost absolute right of recovery. Clearly, the ability to insure a chemical company under these circumstances would be questionable at best and would almost certainly result in higher rates for our customers than those under the present tort system.

Our last comments are addressed to the retroactive application of Titles II and III. Our industry has learned that retroactive legal changes are a major impediment to insurance predictability. As the bill stands now with the current formulation of Title II it will mean that insurers will have their liability exposure increased for areas in which no insurance premiums have either been or will be collected. Should a large number of new claims be filed under Title II the results might prove to be disappointing and perhaps exacerbate the trend towards higher potential liability associated with the production or distribution of manufactured products.

Other provisions of this legislation such as the coordination between product liability claims and workers compensation benefits are essentially procedural and don't pose retroactivity problems. While this may prove to be more expensive than the current system it nevertheless offers the possibility of being more predictable and possibly less expensive in the long run.

The American Insurance Association is mindful of the Committee's willingness to consider the views of the many competing interests that are impacted by this legislation. We stand prepared to work with the Committee in efforts to work ahead in the months ahead with a meaningful solution to the product liability problem.

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